Customs Bulletin

Regulations, Rulings, Decisions, and Notices concerning Customs and related matters

and Decisions

of the United States Court of Appeals for the Federal Circuit and the United States Court of International Trade

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THE DEPARTMENT OF THE TREASURY
U.S. Customs Service

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U.S. Customs Service

Treasury Decisions

19 CFR Part 4

(T.D. 91-46)

RIN 1515-AA80

CARGO RELEASE NOTIFICATION TO CERTAIN VESSEL AND AIR CARRIERS AND BONDED FACILITIES THAT ARE NOT PART OF THE AUTOMATED MANIFEST SYSTEM

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Final rule.

SUMMARY: This document amends the Customs Regulations to provide that Customs may notify certain parties of the release of their cargo by posting in a conspicuous place in the customhouse at ports of entry at the start of each business day a computer-generated list of shipments which have been authorized for release from Customs custody. Release notification will be communicated in this manner to vessel carriers, air carriers and bonded facilities which are not participants in the Automated Manifest System, if entry data has been transmitted through the Automated Broker Interface, and Customs determines that documentation is not required to be physically filed in paper form. This procedure will greatly decrease the amount of paperwork involved in Customs processing of release notifications.

EFFECTIVE DATE: June 14, 1991.

FOR FURTHER INFORMATION CONTACT: Leo Morris, Office of Cargo Enforcement and Facilitation (202) 566-8151.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Section 1448 of title 19, United States Code (19 U.S.C. 1448) provides that no merchandise shall be removed from the place of unlading until a permit for its delivery is issued by Customs. Pursuant to 19 U.S.C. 1484 (j), merchandise shall be released from Customs custody only to or upon the order of the carrier by whom the merchandise is brought to the port at which entry is made, except that merchandise in a bonded warehouse

shall be released from Customs custody only to or upon the order of the proprietor of the warehouse.

Prior to Customs efforts to automate, carriers and bonded warehouse proprietors were notified of the release of their shipments by Customs by receiving a paper copy of a Customs document (usually the Customs Form 3461) for each shipment which was authorized for release by Customs.

In Customs efforts to automate all phases of its entry processing of merchandise into a single automated system, the Automated Commercial System (ACS), Customs has developed a new method of informing carriers and bonded facilities of the release of cargo.

Two integral modules of the ACS, the Automated Manifest System (AMS), and the Automated Broker Interface (ABI), play a role in the creation of the new method of notification of cargo release.

ABI permits qualified trade participants to interface directly with Customs computer and transmit entry release and entry summary data for merchandise being imported. ABI speeds entry processing and provides two-way communication between the user and Customs. In this manner, participants are able to ensure the accuracy and completeness of data by accessing Customs automated reference files. Further, when Customs determines to release a shipment, it can transmit this message electronically to an ABI entry filer.

AMS is, in essence, both an imported merchandise inventory control system and a cargo release notification system. AMS permits qualified carriers to transmit their manifest data (a list of the goods transported by the carrier) to Customs. By comparing information provided in the AMS with automated Customs entry data submitted through ABI, Customs is able to make informed decisions with respect to the allocation of resources for the inspection of merchandise. One of the advantages AMS provides to participants is an electronic notification of Customs action authorizing the release of the cargo and its delivery to the consignee.

While AMS and ABI participants receive electronic status notifications regarding the release of cargo when entry data is furnished via ABI, vessels, aircraft or bonded facilities which are not participants in AMS do not receive electronic notification of the releases. Accordingly, a broker may receive electronically through ABI a cargo release notification before a carrier or bonded facility operator is aware that Customs has approved the release of the cargo. Until a recent test program, non-AMS carriers were notified of the release of their cargo in the same manner as pre-automation; they were notified of release of shipments by receipt of paper copies of documents authorizing release.

Proposals Published

On August 15, 1988, Customs published a notice in the Federal Register (53 FR 30696), proposing to discontinue the practice of providing separate copies of release documents with respect to transactions of non-AMS carriers and bonded facility operators for which entry data is furnished via ABI and which based on Customs analysis represent the

most minimal risk of violation of the Customs laws. Customs proposed with respect to these types of transactions that if it determines that the cargo may be released without submission of paper documents through review of entry data submitted electronically through ABI and its selectivity criteria (the categories of information which guide Customs judgment in evaluating and assessing the risk of a transaction; see T.D. 90-92 published in the Federal Register (55 FR 49879) on December 3, 1990 – the final regulations on electronic entry filing), it will post this information in a conspicuous place in the customhouse at the port of entry where the cargo was imported, as well as transmit a message through ABI to the ABI entry filer that the cargo is released. It should be noted that the electronic message the ABI entry filers will receive informing them of the cargo's release is not an official release notice. Pursuant to the proposal, the official notice to non-AMS carriers and bonded facility operators for transactions for which entry data is furnished through ABI and paper documentation is not required to be filed will be the posting of the computer-generated list of released shipments which will appear at the start of each business day at the customhouse at the Customs port of entry where the cargo was imported.

Ten comments were received regarding this initial proposal. After reviewing the comments, Customs determined that the proposal required modification. Subsequently, on September 13, 1990, Customs republished a modified proposal in the Federal Register (55 FR 37716), soliciting further comment.

Discussion of Comments on Modified Proposal

Only two letters were received in response to the modified proposal and both letters raised similar issues to those raised in comments on the previous notice. An analysis of the comments follows:

Comment:

The posting of paperless releases for nonautomated ocean carriers should be delayed until most ocean carriers are using AMS.

Response:

Customs processes over 60 per cent of the ocean bills of lading through AMS at the present time. Seventy-five percent of ocean tonnage imported into the U.S. is carried on AMS carriers. As evidenced by these statistics, this regulation, which affects only those carriers which are not on AMS when the entry data for cargo is transmitted through ABI, will affect release notifications relating only to a small percentage of the merchandise carried by ocean carriers. As the purpose of this regulation is to reduce reliance on paper documents and to promote participation in AMS and the majority of ocean cargo is processed through AMS already, it would be counterproductive to wait for the many small steamship lines to automate. Automated port authorities and service centers are available to serve them.

Comment:

The posting of releases processed the previous day denies the carrier timely notice of cargo releases.

Response:

Customs agrees that the posting of releases from the previous day is not as timely as electronic release. However, this procedure does not cause an indefinite delay. Carriers will be notified of the release of merchandise under this procedure at the most 24 hours after entry is presented. The timeliness of this procedure does not vary much from the timeliness of receiving a paper release on a Customs Form 3461, which is the system still in effect for carriers who are not on AMS when entry data is not transmitted through ABI.

Comment:

Customs should adopt one of the following three options rather than adopt this regulation: (1) continue to provide non-AMS carriers with a timely paper release; (2) designate the release provided by the broker as "official"; or (3) provide non-AMS carriers and/or their agents the release electronically.

Response:

These options are not viable. One of the purposes of this regulation is to give incentive to non-AMS carriers to automate. Accordingly, maintaining the status quo and continuing to provide non-AMS carriers with paper releases would be counter to the purpose of this regulation. Regarding the second suggested option, Customs cannot, pursuant to statute, consider the release provided by the broker as "official." Pursuant to 19 U.S.C. 1448, no merchandise shall be removed from the place of unlading until a permit for its delivery is issued by Customs. Pursuant to 19 U.S.C. 1484(j), merchandise shall be released from Customs custody only to or upon the order of the carrier by whom the merchandise is brought to the port at which entry is made, except that merchandise in a bonded warehouse shall be released from Customs custody only to or upon the order of the proprietor of the warehouse. In other words, pursuant to statute, Customs must provide the release notification to the carrier and it is the carrier (or warehouse proprietor) which is liable for unpaid duties for merchandise which is mistakenly released or misdelivered. Accordingly, the release provided by the broker cannot be deemed "official." Regarding the third option, we fail to understand how one without electronic capability can be electronically notified of release.

Comment:

With posting of releases on the customhouse wall, a carrier has no paper document to complete its manifest file to show evidence that Customs released certain merchandise in the event that Customs audits.

Response:

Customs maintains the release records for paperless entries. Customs auditors would not generally look for any evidence from carriers

unless there is a misdelivery, and in that event, the auditors would be looking for documents like delivery orders rather than notices of release.

Conclusion

After careful consideration of all the comments received and further review of the matter, Customs has determined that the amendment should be adopted. Accordingly, this document provides that a report posted at the customhouse will serve as release notification to vessel carriers, air carriers and bonded facilities when the manifest is not filed through the Automated Manifest System, the entry has been filed through the Automated Broker Interface and Customs determines that paper documentation need not be filed. The only modification to the document is the reference to electronic entry filing. The proposed regulation described the criterion that Customs determines that paper documentation need not be filed as "the cargo qualifies for electronic entry filing". To be consistent with Treasury Decision 90-92, this language has been changed to read "Customs has approved the cargo for release without submission of paper documents after reviewing the entry data submitted electronically through ABI and its selectivity criteria (see § 143.34)."

Executive Order

This document does not meet the criteria for a "major rule" as defined in section 1(b) of E.O. 12291. Accordingly, no regulatory impact analysis has been prepared.

Regulatory Flexibility Act

Pursuant to the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), it is certified that the amendment will not have a significant economic impact on a substantial number of small entities. Accordingly, the amendment is not subject to the regulatory analysis requirements of 5 U.S.C. 603 and 604.

Drafting Information

The principal author of this document was Harold M. Singer, Regulations and Disclosure Law Branch, U.S. Customs Service. However, personnel from other offices participated in its development.

List of Subjects in 19 CFR Part 4

Carrier, Release of merchandise, Vessels.

Amendments to the Regulations

Part 4 of the Customs Regulations (19 CFR Part 4) is amended as set forth below:

PART 4—VESSELS IN FOREIGN AND DOMESTIC TRADES

1. The general authority citation for Part 4, Customs Regulations (19 CFR Part 4) continues to read as follows:

Authority: 5 U.S.C. 301; 19 U.S.C. 66, 1624; 46 U.S.C. App. 3.

2. Section 4.38(a), Customs Regulations, is revised to read as follows:

§ 4.38 Release of cargo.

(a) No imported merchandise shall be released from Customs custody until a permit to release such merchandise has been granted. Such permit shall be issued by the district director only after the merchandise has been entered and, except as provided for in § 141.102(d) or part 142 of this chapter, the duties thereon, if any, have been estimated and paid. Generally, the permit shall consist of a document authorizing delivery of a particular shipment or an electronic equivalent. Alternatively, the permit may consist of a report which lists those shipments which have been authorized for release. This alternative cargo release notification may be used when the manifest is not filed by the carrier through the Automated Manifest System, the entry has been filed through the Automated Broker Interface, and Customs has approved the cargo for release without submission of paper documents after reviewing the entry data submitted electronically through ABI and its selectivity criteria (see § 143.34). The report shall be posted in a conspicuous area to which the public has access in the customhouse at the port of entry where the cargo was imported.

(1) Where the cargo arrives by vessel, the report shall consist of the following data elements:

(i) Vessel name or code, if transmitted by the entry filer;

(ii) Carrier code;

(iii) Voyage number, if transmitted by the entry filer;

(iv) Bill of lading number;

(v) Quantity released; and

(vi) Entry number (including filer code).

(2) Where the cargo arrives by air, the report shall consist of the following data elements:

(i) Air waybill number;

(ii) Quantity released;

(iii) Entry number (including filer code);

(iv) Carrier code; and

(v) Flight number, if transmitted by the entry filer.

(3) In the case of merchandise traveling via in-bond movement, the report will contain the following data elements:

(i) Immediate transportation bond number;

(ii) Carrier code;

(iii) Quantity released; and

(iv) Entry number (including filer code).

When merchandise is released without proper permit before entry has been made, the district director shall issue a written demand for redelivery. The carrier or facility operator shall redeliver the merchandise to Customs within 30 days after the demand is made. The district director may authorize unentered merchandise brought in by one carrier for the account of another carrier to be transferred within the port to the latter carrier's facility. Upon receipt of the merchandise the latter

carrier assumes liability for the merchandise to the same extent as though the merchandise had arrived on its own vessel.

CAROL HALLETT,
Commissioner of Customs.

Approved: May 9, 1991.
PETER K. NUNEZ,
Assistant Secretary of the Treasury.

[Published in the Federal Register, May 15, 1991 (56 FR 22328)]

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19 CFR Part 101

(T.D. 91-47)

CHANGES IN THE CUSTOMS SERVICE FIELD ORGANIZATION; APALACHICOLA, CARRABELLE, AND PORT ST. JOE, FLORIDA

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Final rule.

SUMMARY: This document amends the Customs Regulations by removing the ports of entry of Apalachicola and Carrabelle and redesignating Port St. Joe a Customs station. Even though these ports have been inactive for many years, Customs has had to provide full service there because of their designation. A review of requirements and available resources indicates that closing Apalachicola and Carrabelle as ports of entry and converting Port St. Joe to a Customs station is warranted.

EFFECTIVE DATE: July 15, 1991.

FOR FURTHER INFORMATION CONTACT: Joseph O'Gorman, Office of Inspection and Control, 202-566-9425.

SUPPLEMENTARY INFORMATION:

BACKGROUND

The Customs organizational structure consists of regions, districts, ports of entry within districts, and stations supervised by ports. The list of designated Customs ports of entry is set forth in § 101.3(b), Customs Regulations (19 CFR 101.3(b)). Customs stations are listed in § 101.4(c), Customs Regulations (19 CFR 101.4(c)).

Customs ports of entry and stations are locations where Customs officers or employees are assigned to accept entries of merchandise, clear passengers, collect duties, and enforce the various provisions of

Customs and related laws. The significant difference between ports of entry and stations is their operational cost to the government. At ports of entry, the government incurs the costs associated with the operation. At stations, the government is reimbursed for:

(1) The salaries and expenses of its officers or employees for services rendered in connection with the entry or clearance of vessels; and

(2) Except as otherwise provided by the Customs Regulations, the expenses (including any per diem allowed in lieu of subsistence), but not the salaries of its officers or employees, for service rendered in connection with the entry or delivery of merchandise.

As part of a continuing program to obtain more efficient use of its personnel, facilities, and resources, and to continue to provide better service to carriers, importers, and the public, Customs is closing the Apalachicola and Carrabelle ports of entry located in the Florida panhandle area, and, at the same time, redesignating Port St. Joe a Customs station. These ports of entry have been inactive and not manned for a number of years. Only six vessels were entered at Port St. Joe during a recent three-year period. This low level of activity does not warrant designation as ports of entry.

Adequate Customs service will continue to be provided to the Panhandle region of Florida through the ports of Panama City and Pensacola, as well as the Port St. Joe station. Pensacola, Panama City, and Port St. Joe are located along the coast in a linear pattern, and are thus able to provide convenient service to importers in that area. In addition, the port of Mobile is located in close proximity to Pensacola. Importers and brokers had indicated their preference for using this larger port of entry to enter and clear merchandise. Since there appears to be no imminent increase in international activity in the Panhandle area, closing these ports of entry will have little, if any, economic impact in this area.

Notice of this action was contained in a Notice of Proposed Rulemaking published in the Federal Register on October 24, 1990 (55 FR 42860), and interested parties were invited to comment on the action. No comments were received.

Drafting Information

The principal author of this document was Peter T. Lynch, Regulations and Disclosure Law Branch, Office of Regulations and Rulings, U.S. Customs Service. However, personnel from other Customs offices participated in its development.

Executive Order 12291 and Regulatory Flexibility Act

Because this rule relates to agency Organization and management, it is not subject to either Executive Order 12291 or the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*).

Lists of Subjects in 19 CFR Part 101

Customs duties and inspection, Exports, Imports, organization and functions (Government agencies).

AMENDMENT TO THE REGULATIONS

Part 101, Customs Regulations (19 CFR Part 101) is amended as set forth below:

PART 101—GENERAL PROVISIONS

1. The authority for Part 101 continues to read as follows:

Authority: 5 U.S.C. 301, 19 U.S.C. 2, 66, 1202 (General Note 8, Harmonized Tariff Schedule of the United States) 1623, 1624.

§ 101.3 [Amended]

2. Section 101.3(b) is amended by removing the entries "Apalachicola, Fla.", "Carrabelle, Fla. (E.O. 7508, Dec. 11, 1936; 1 FR 2149)", and "Port St. Joe, Fla. (E.O. 7818, Feb. 17, 1938; 3 FR 503)", in the column headed "Ports and entry," in the Tampa, Florida District of the Southeast Region.

§ 101.4 [Amended]

3. Section 101.4(c) is amended by inserting, in appropriate alphabetical order, in the listing for "Tampa, Fla." under the "District" column, "Port St. Joe" in the column headed "Customs stations" and "Panama City" in the column headed "Port of entry having supervision".

JOHN B. O'LOUGHLIN,
Acting Commissioner of Customs.

Approved: May 10, 1991.
PETER K. NUNEZ,
Assistant Secretary of the Treasury.

[Published in the Federal Register, May 16, 1991 (56 FR 22641)]

U.S. Customs Service

Customs Service Decisions

DEPARTMENT OF THE TREASURY,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
Washington, DC, May 15, 1991.

The following are decisions of the United States Customs Service where the issues involved are of sufficient interest or importance to warrant publication in the CUSTOMS BULLETIN.

HARVEY B. FOX,
Director,
Office of Regulations and Rulings.

(C.S.D. 91-7)

This ruling holds that jewelry which is subjected to gold or silver electroplating after importation does not constitute substantial transformation within the meaning of 19 CFR 134.35.

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, September 7, 1990.

File: HQ 732159
MAR 2-05 CO:R:C:V 732159 NL
Category: Marking

MR. JAMIE BOBLITT
SUPERIOR JEWELRY COMPANY
8935 Rossash Road
Cincinnatti, Ohio 45236

Re: Country of origin marking of gold and silver plated chain jewelry; electroplating; substantial transformation.

DEAR MR. BOBLITT:

This is in response to your letter of February 16, 1989, in which you ask for a ruling that the base metal chain which you import from Korea undergoes a substantial transformation upon being plated with gold or silver in the U.S. We regret the delay in responding.

Facts:

The jewelry in question is imported from Korea as base metal chains in necklace length and fitted with clasps. Upon importation the articles

are classifiable under subheading 7117.19.50. of the Harmonized Tariff Schedule of the United States (HTSUS) as "imitation jewelry of base metal, whether or not plated with precious metal* * *other". The cost of the imported base metal chains is given as $1.54 per dozen. It is then sent to an electroplater in the U.S. for gold or silver plating, tagging and packaging. Depending upon the type of chain, this processing consists of immersing the chain in a series of chemical solutions. After electroplating and packaging the cost of the chains per dozen is given as $5.38 for silver and $4.77 for gold. For classification purposes the same subheading, 7117.19 HTSUS, remains applicable to the imitation jewelry after gold or silver electroplating. Samples were submitted.

Issue:

Does electroplating of the imitation jewelry effect a substantial transformation such that the chain is excepted from individual country of origin marking requirements?

Law and Analysis:

Section 304 of the Tariff Act of 1930, as amended (19 U.S.C. 1304), requires, subject to certain specified exceptions, that every article of foreign origin imported into the U.S. be marked in a conspicuous place as legibly, indelibly, and permanently as the nature of the article will permit, in such a manner as to indicate to the ultimate purchaser in the U.S. the English name of the country of origin of the article. Part 134, Customs Regulations (19 CFR Part 134), implements the country of origin marking requirements and exceptions of 19 U.S.C. 1304.

"Country of origin" is defined in 19 CFR 134.1(b) as the country of manufacture, production or growth of any article of foreign origin entering the U.S. Further work or material added to an article in another country must effect a "substantial transformation" in order to render such other country the "country of origin". As provided in 19 CFR 134.35, an article used in the U.S. in manufacture, which results in an article having a name, character, or use differing from that of the imported article will be considered to have been substantially transformed. The manufacturer in these circumstances is the "ultimate purchaser" of the imported article, and the imported article is excepted from country of origin marking at importation, provided its outermost container is so marked.

In determining whether further work or material added to an article has effected a substantial transformation, our inquiry is whether the article after the further work or added material emerges having a different name, character or use. *U.S. v. Gibson-Thomsen Co., Inc.*, 27 C.C.P.A. 267 (C.A.D. 98) (1940). A secondary though not unimportant consideration is whether the imported article has been subjected to a complex process which adds significantly to its value. *Superior Wire v. United States,* 669 F. Supp. 472, 480 (CIT 1987), *aff'd* 867 F. 2d 1409 (Fed. Cir. 1989).

Turning to the chain jewelry, we are of the opinion that the base metal chain is not substantially transformed by gold and silver electroplating.

The electroplating process is considered a finishing operation which does not change the character or use of the article as imported. What was unfinished imitation jewelry at importation is merely completed by electroplating, and the slight change in the name of the article cannot overcome the finding that the article's character and use remain the same.

This conclusion is supported by the HTSUS provision applicable to imitation jewelry, subheading 7117.19, which does not recognize a difference, for classification purposes, between plated and unplated imitation jewelry. To the contrary, Note 10 to Chapter 71 indicates that plating and "minor constituents" effect no change in imitation jewelry for tariff purposes, as opposed to the addition of pearls and precious or semiprecious stones, or cladding with precious metal, which remove articles from the subheading for "imitation jewelry".

It is noted that in the electroplating process only a small amount of gold or silver is added to each article, and that the amount of time required to process each necklace is small. The electroplating process itself consists essentially of dipping the article in a solution. As compared with the process of manufacturing the base metal chain, cutting it to length, and fitting it with a clasp, it is our opinion that the electroplating is not a substantial manufacturing operation, and does not effect a substantial transformation. On this basis the value added by electroplating in the U.S. may be disregarded in favor of more important factors. *See, Superior Wire v. United States, supra,* at 478-9 (CIT 1987) (value-added analysis may be an additional inquiry, or cross-check, in substantial transformation cases, but is not, by itself, the entire answer). Despite the added value, electroplating does not change the character or use of the imitation jewelry, and changes its name only from unplated to plated, which the HTSUS treats as no change for tariff purposes.

Customs has not previously addressed this issue with respect to imitation jewelry. However, a review of prior Customs determinations regarding electroplating generally reveals a lack of harmony. In HRL 058661 (November 6, 1978), Customs stated that for purposes of item 807.00, Tariff Schedules of the United States (TSUS), "the mere gold plating of a partially assembled or nearly complete foreign product [here, watch cases and bands] in the United States is not considered a substantial transformation of the imported product." *Accord,* HQ 554692 (March 8 ,1988) (electroplating watch bracelets with gold); HRL 063117 (June 28, 1979) (electroplating electrical connectors); HRL 046885 (1976) (electroplating silicon wafers with tin). Other rulings concerning item 807.00, TSUS, have been contradictory; HRL 058072 (February 7, 1978) held that the gold electroplating of a watch bezel was a substantial transformation of that part, although not of the watchcase as a whole. This ruling was followed in HRL 058863 (March 2, 1979), and HRL 058818 (March 19, 1979).

In country of origin marking cases, several rulings are inconsistent with the position reached in this ruling. In ORR Ruling 408-71 (June 28, 1971), Customs held that silverplating and lacquering of a brass wine

basket effected a substantial transformation of the article. In two rulings concerning gold and silver plated silverware, Customs found that for purposes of country of origin marking the articles were substantially transformed or changed by the plating. *See,* C.S.D. 80-237, 14 *Cust. B. & Dec.* 1150 (1980) (in view of its high added cost and value silver plating of imported stainless steel flatware results in a substantial change to the flatware and cannot be considered merely a minor process); HRL 708800 (May 16, 1978) (gold or silver plating of imported stainless steel cutlery is a substantial change in the imported article).

The following rulings, which are not in accordance with our finding here that electroplating does not effect a substantial transformation, are revoked: ORR Ruling 408-71; C.S.D. 80-237; and HRL 708800. These revocations assure that Customs' position on substantial transformation for marking purposes is consistent with its position with respect to other provisions of Customs law, such as subheading 9802.00.80, HTSUS (formerly item 807.00, TSUS). The following rulings are modified to the extent that gold plating of a watch bezel is no longer considered to be a substantial transformation of that article: HRL 058072; HRL 058863; and HRL 058818.

Holding:

Imitation chain jewelry which is subjected to gold or silver electroplating after importation is not substantially transformed into a different article having a new name, character or use within the meaning of 19 CFR 134.35. Accordingly, the importer/processor is not the ultimate purchaser of the jewelry, and it must be marked with its country of origin in accordance with the requirements of 19 U.S.C. 1304. Prior rulings are modified or revoked in accordance with this ruling.

JOHN DURANT,
Director,
Commercial Rulings Division.

(C.S.D. 91-8)

This ruling addresses a U.S. Customs Service determination regarding 1) the date of diversion; 2) the date of importation; and 3) the eligibility for drawback of a telecommunications satellite the components of which were originally imported as instruments of international traffic and intended for use aboard the U.S. Space Shuttle but ultimately launched in another country (T.D. 70-178, T.D. 70-214(1), Pub. L. 98-573, sec. 124(c), 19 U.S.C. 1313(a), 19 U.S.C. 1322(a), 19 CFR 10.41a(d), 19 CFR 191).

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, February 22, 1991.

File: HQ 111107
BOR-7-07-CO:R:IT:C 111107 KVS
Category: Carriers

BRUCE H. LEEDS
MANAGER, EXPORT/IMPORT OPERATIONS
HUGHES AIRCRAFT CO.
7200 Hughes Terrace
P.O. Box 45066
Los Angeles, CA 90045-0066

Re: Instrument of international traffic; communications satellite; components; date of importation; diversion; drawback.

DEAR SIR:

This is in response to your letter of June 14, 1990, which requests a ruling regarding telecommunications satellites intended for use aboard the Space Shuttle but launched in another country, which were originally imported as instruments of international traffic. Your ruling request asks that we provide information as to three issues: 1) the date of diversion of such articles; 2) the date of import for such articles; and 3) the eligibility drawback of such articles.

Facts:

From 1983 until 1986, Hughes Aircraft Company imported satellite components into the United States, some of which were designated as instruments of international traffic, to be utilized on the Intelsat 6 satellites produced by that company. Of the five satellites to be built in this series, two were scheduled for launch on the Space Shuttle, two on the European Ariane rocket and one was undetermined.

The imported components were identified as either "flight" or "non-flight" components because of the requirement that a satellite be launched from the United States in order to be categorized as an instrument of international traffic (IIT). We are informed that for "flight" components, Hughes Aircraft identified the particular satellite to which they were assigned as well as the location of launch for that particular satellite. We are told that IIT status was claimed only for those "flight" components scheduled for Space Shuttle launch.

One of the satellites scheduled for launch aboard U.S. spacecraft was Intelsat 6 F2 (flight model 2). Hughes informs us that the components for the F2 satellite were imported between July 1984 and July 1985 and that the parts were used within three years of receipt.

We are told that the intended launch schedule for the Intelsat 6 F2 was influenced by several factors. Production delays detained completion of this satellite beyond original estimates. As a result of the accident involving the Space Shuttle Challenger in January 1986, future launches were delayed and commercial satellites were eliminated from

the Shuttle payload. Therefore, although the Intelsat 6 F2 was originally intended for launch aboard the Space Shuttle in 1986, the satellite was exported to French Guiana on April 21, 1989 and launched into orbit on an Ariane rocket on November 10, 1989.

Issues:

I. What is the date of diversion for a telecommunications satellite, whose components were originally imported as instruments of international traffic, which was intended for use aboard the U.S. Space Shuttle but was ultimately launched in another country.

II. What is the date of importation for a telecommunications satellite whose components were originally imported as instruments of international traffic.

III. Whether drawback under 19 U.S.C. 1313(a) may be granted when satellite components imported into the United States as instruments of international traffic between July 1984 and July 1985 are manufactured or produced into a telecommunications satellite which was exported to a foreign country in 1989.

Law and Analysis:

Section 322(a), Tariff Act of 1930, as amended (19 U.S.C. 1322(a)), provides that "[v]ehicles and other instruments of international traffic, of any class specified by the Secretary of the Treasury, shall be excepted from the application of the customs laws to such extent and subject to such terms and conditions as may be prescribed in regulations or instructions of the Secretary of the Treasury."

Treasury Decision 70-178 designated communications satellites, their components, and spare parts brought into the United States to be launched in the United States for use in a global communications satellite system as instruments of international traffic. Treasury Decision 70-214(1) provided for the storage of the components and parts under a special bond.

The authority of the Secretary to make a designation for these articles was statutorily revoked in 1984 by Pub. L. 98-573, section 124(c), which amended 19 U.S.C. 1322(a) to read, "[t]he authority delegated to the Secretary by this subsection shall not extend to communications satellites and components and any parts thereof."

The amendment did not purport to revoke IIT status for satellites and components already designated as instruments of international traffic. Therefore, any such articles imported before the amendment's effective date, January 1, 1985, would retain their status as instruments of international traffic until diverted or destroyed. Conversely, any importations occurring after January 1, 1985, would not be entitled to treatment as instruments of international traffic and any such importations would be subject to the payment of duty as well as any applicable penalty action.

The Customs Service has held that diversion of an instrument of international traffic renders that article subject to duty. Regarding the articles under consideration, launch from the United States was a requirement for a satellite to be designated as an instrument of international traffic (see Customs Ruling 105535, dated June 22, 1982). Therefore, if a satellite is exported to French Guiana for launch, the article has been withdrawn from its use as an instrument of international traffic in the United States and a diversion has occurred.

I. *Date of Diversion:*

As stated above, the 1984 amendment which effectively denied communications satellites and their component parts status as instruments of international traffic did not apply retroactively to revoke the status of such articles entered before January 1, 1985. Therefore, for those items, the date of diversion must be determined.

It is urged that the date of diversion be determined to be the date of launch in French Guiana. The inquirer contends that, notwithstanding the fact that the parts were assigned to a particular spacecraft upon entry into the United States, they were interchangeable and thus could ultimately be used on another Intelsat 6 satellite. Consequently, it is asserted that although the launch configuration of certain components is more certain at the time of export, the final configuration is not final until the date of the launch in French Guiana.

We do not find this argument to be persuasive as it disregards the effect of the 1984 statutory amendment. As previously stated, the statute disallowed the designation of satellites and component parts as instruments of international traffic after January 1, 1985. Therefore, if a satellite already designated as an IIT is exported after January 1, 1985, it may not be re-entered as an IIT, regardless of whether the satellite is launched from French Guiana an the Ariane or whether it re-enters the United States to be launched aboard the Space Shuttle.

The operative date becomes the date the article is exported from the United States. Once exported, the item is no longer an instrument of international traffic; it has been removed from the launch cycle of a U.S. spacecraft and thus, has been effectively diverted. The date of diversion, then, is the date on which the article is exported to a foreign country.

II. *Date of Importation:*

We agree with the inquirer that, as a general matter, the date of importation is governed by the definition in 19 CFR 101.1(h), which states:

> "Date of importation" means, in the case of merchandise imported otherwise than by a vessel, the date on which the merchandise arrives within the Customs territory of the United States. In the case of merchandise imported by vessel, "date of importation" means the date on which the vessel arrives within the limits of a port in the United States with intent then and there to unlade such merchandise.

We are urged by the inquirer to disregard this general rule and instead find that the date of importation for the satellites under consideration occurred at the time the articles were diverted or otherwise withdrawn from use as instruments of international traffic, which the inquirer contends is the date of launch in French Guiana. The rationale given for this position is that the satellites and component parts, having been designated as instruments of international traffic, were not "imported" in the usual sense, presumably since a consumption entry was not filed upon arrival in the United States.

We find no basis of support for this position. C.S.D 79-19 (dated July 7, 1978), in discussing the date of importation for drawback purposes of certain warehoused material, held that "the date of importation is determined by the means of conveyance." The Customs service established that importation and entry constitute separate events by stating "[t]he importation occurs before the merchandise is entered for consumption or warehouse" and thus rejected the argument that date of importation for the articles under consideration did not occur until the time it became necessary to file a consumption entry.

III. *Eligibility for Drawback:*

Drawback is provided for in section 313, Tariff Act of 1930, as amended (19 U.S.C. 1313). Under paragraph (a) of this statute:

> [u]pon the exportation of articles manufactured or produced in the United States with the use of imported merchandise, the full amount of duties paid upon the merchandise so used shall be refunded as drawback, less 1 per centum of such duties * * *

Paragraph (i) of 19 U.S.C. 1313 provides that:

> [n]o drawback shall be allowed under the provisions of this section unless the completed article is exported within five years after importation of the imported merchandise.

The Customs Regulations pertaining to drawback are found in Part 191 of the Customs Regulations (19 CFR Part 191).

In this case Hughes has an approved drawback contract (see Treasury Decision 80-296(M)) under which it is allowed to claim drawback on imported electronic and mechanical components used in manufacturing communication satellites, spacecraft, and electronic and-mechanical subassemblies for satellites and spacecraft. Applicable duties would be paid on satellite components withdrawn from IIT status (19 CFR 10.41a(d)) and would be treated as "duties" for purposes of 19 U.S.C. 1313(a) (see Customs Service Decision 85-50).

Accordingly, if the satellite components, the manufacture of those components in the United States, and the manufactured articles are within the drawback contract obtained by your company, and if the requirements in 19 U.S.C. 1313 and 19 CFR Part 191 are complied with, Hughes could qualify for drawback if the exportation of the satellites occurs within five years from the date of importation of the components for which drawback is claimed. In this case importation occurred at the

time the components were brought into the United States (i.e., between July 1984 and July 1985). Therefore, drawback may only be granted with regard to the satellite components exported less than five years after the date of importation, and then only upon compliance with the applicable drawback contract, 19 U.S.C. 1313, and 19 CFR Part 191.

Holding:

I. The date of diversion for a telecommunications satellite, whose components were originally imported as instruments of international traffic, which was intended for use aboard the U.S. Space Shuttle but was ultimately launched in another country is the date the satellite was exported to a foreign country.

II. The date of importation for a telecommunications satellite whose components were originally imported into the United States as instruments of international traffic is the date the components arrived in the Customs territory of the United States.

III. When satellite components imported into the United States as instruments of international traffic between July 1984 and July 1985 are manufactured or produced into a telecommunications satellite which was exported into a foreign country in 1989, drawback under 19 U.S.C. 1313(a) may only be granted with regard to the components exported less than five years after the date of importation, and then only upon compliance with the applicable drawback contract, 19 U.S.C. 1313, and 19 CFR Part 191.

B. JAMES FRITZ,
Chief,
Carrier Rulings Branch.

(C.S.D. 91-9)

This ruling holds, that foreign vessels will not be held in violation of the "Jones Act" (46 U.S.C., App. 883) for transporting Strategic Petroleum Reserve (SPR) oil provided necessary documentation in the form of a manifest and a written certification signed by the vessel master, agent or operator is furnished U.S. Customs at the port of entry (64 Stat. 1120, 46 U.S.C. App. 883, 42 U.S.C. 6202(8)).

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, February 22, 1991.

File: VES-3/5-CO:R:IT:C 111523 GEV

DONALD A. TOENSHOFF
PHIBRO ENERGY INC.
600 Steamboat Road
Greenwich, Connecticut 06830

DEAR MR. TOENSHOFF:

This is in response to your facsimile transmission of February 11, 1991, requesting a waiver of 46 U.S.C. App. 883 (i.e., the "Jones Act") in connection with the transportation of oil pursuant to the recent Strategic Petroleum Reserve (SPR) draw down (Department of Energy sales contract DE-SC96-91P051023). Specifically, you request a waiver of § 883 so that the MT *Esso Mexico*, a Bahamian-flag vessel, may transport oil laded from the SPR at St. James, Louisiana, to the Exxon refinery at Baton Rouge, Louisiana.

Under 46 U.S.C. App. 883 the transportation of merchandise between points in the United States embraced within the coastwise laws, either directly or via a foreign point, or for any part of the transportation, in any vessel other than a vessel built in and documented under the laws of the United States and owned by persons who are citizens of the United States is prohibited.

The only statute authorizing the waiver of the coastwise laws, including 46 U.S.C. App. 883, is the Act of December 27, 1950 (64 Stat. 1120; note preceding 46 U.S.C. App. 1). This statute provides that "[t]he head of each department or agency responsible for the administration of the navigation and vessel inspection laws is directed to waive compliance with such laws upon the request of the Secretary of Defense [and] [t]he head of such department or agency is authorized to waive compliance with such laws * * * either upon his own initiative or upon the written recommendation of the head of any government agency whenever he deems that such action is in the interest of national defense."

As you know, recent events in the Persian Gulf have resulted in a potential national energy supply shortage constituting a "severe energy supply interruption" as defined in section 3(8) of the Energy Policy and Conservation Act (42 U.S.C. 6202(8)). Based on this finding the President, pursuant to a memorandum dated January 16, 1991, has authorized the Secretary of Energy to draw down and distribute the SPR, and directed the Secretary of the Treasury to waive compliance with the coastwise laws for the transportation of SPR oil during this drawdown.

Pursuant to a delegation of authority from the Acting Assistant Secretary (Enforcement), dated January 17, 1991, (No. 15-30), to waive compliance with 46 U.S.C. App. 883 for the transportation of oil which is drawn down from the SPR, Customs officers have been directed not to enforce the restriction against foreign vessels which can demonstrate by

production of both a manifest and a written certification signed by the master, vessel agent, or operator, that the cargo on the entering vessel was drawn down from the SPR, and the voyage represented the first transportation of crude by water.

Accordingly, the MT *Esso Mexico* will not be in violation of 46 U.S.C. App. 883 for transporting SPR oil as proposed provided the above documentation is produced to Customs upon entry of the vessel in New Orleans.

B. JAMES FRITZ,
Chief,
Carrier Rulings Branch.

(C.S.D. 91-10)

This ruling holds that the U.S. Customs Service published Statement of Clarification for T.D. 85-111 (54 FR 29973), issued in accordance with 19 C.F.R. 177.9(d), applies to entries made on or after October 16, 1989; the designated effective date in the published clarification. U.S. Customs Service Headquarters ruling letter 544155, of December 16, 1988, is hereby modified to incorporate the application of the Statement of Clarification.

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, March 1, 1991.

File: HQ 544580
VAL CO:R:C:V 544580 VLB
Category: Valuation

DISTRICT DIRECTOR OF CUSTOMS
10 Causeway Street
Boston, Massachusetts 02222

Re: Dutiability of "interest" payments.

DEAR SIR:

This is in response to your memorandum (ENT-3-0:RA EJS) dated August 8, 1990 forwarding a Request for Internal Advice on the dutiability of payments made by BASF Corporation Information Systems (hereinafter referred to as "the importer") to its supplier BASF AG of Ludwigshafen, Germany (hereinafter referred to as "the seller").

Facts:

As you know, the issue of the dutiability of purported interest payments made by the buyer to the seller arose out of an audit conducted by Customs in 1987. At that time, the Regulatory Audit personnel in the Northeast Region requested internal advice on the dutiability of the payments.

On December 16, 1988, Customs issued Headquarters Letter Ruling (HRL) 544155. In the HRL, we held that the the importer payments to the seller met the requirements of T.D. 85-111, which at the time was the only applicable statement by Customs on determining the dutiability of payments that were allegedly interest payments.

Subsequently, on July 17, 1989, Customs published a Statement of Clarification for T.D. 85-111 (54 FR 29973) ("the Clarification"). In the Statement of Clarification, Customs stated that for purposes of T.D. 85-111, "the term "interest" encompasses only *bona fide* interest charges, not simply the notion of interest arising out of delayed payment." Customs further added that "*bona fide* interest charges are those payments that are carried on the importer's books as interest expenses in conformance with generally accepted accounting principles". The Clarification became effective on October 16, 1989, which was ninety days after the Clarification was published in the Federal Register.

By letter dated August 15, 1989, counsel for the importer stated that the importer was concerned about the impact of the Clarification on HRL 544155. Counsel requested that Customs "confirm in writing that the Statement of Clarification does not in any way alter the effectiveness of the ruling". Counsel subsequently withdrew this request before Customs ruled on the issue.

Issue:

Whether the Statement of Clarification for T.D. 85-111 applies to the importer's entries on or after October 16, 1989.

Law and Analysis:

Counsel for the importer contends that "[t]here have been no changes in the operative facts or controlling law which would justify a departure from the decision taken in [HRL] 544155". In addition, counsel states that its reading of the Statement of Clarification indicates that the Clarification was not intended to replace or supersede the criteria governing the dutiability of interest charges, as published in T.D. 85-111. Finally, counsel asserts that there is nothing in the Statement of Clarification indicating that Customs intended to modify or revoke the decision in HRL 544155 on the dutiability of the importer's payments to the seller.

Under 19 CFR 177.9(d), any ruling letter that is not in accordance with the current view of the Customs Service may be modified. The modification is effected by Customs Headquarters giving notice to the person to whom the ruling letter was addressed, in this case the Deputy Assistant Regional Commissioner for the Northeast region, and if necessary, by the publication of a statement in the Customs Bulletin.

In this case, the publication of the Statement of Clarification provided notice that Customs would require specified evidence from importers who are claiming a deduction under T.D. 85-111. In HRL 544155 Customs did not address the Clarification because the Clarification had not been issued. Therefore, HRL 544155 is not in accordance with the cur-

rent view of the Customs Service and must be modified to encompass the applicability of the Clarification.

As a result, the question of whether the importer meets the evidentiary requirements set out in the Clarification must be examined. As previously discussed, under the Clarification, *bona fide* interest payments are considered to be payments that are carried on the importer's books as interest expenses in conformance with generally accepted accounting principles.

The importer in this case does not book the payments to the seller as interest expenses. Therefore, the importer does not meet the evidentiary requirements that are set out in the Clarification. This approach is analogous to the Customs treatment of buying commissions. An importer can declare that it has *bona fide* buying commissions that should not be included as part of the price actually paid or payable. However, if requested, the importer must produce an invoice or other documentation from the foreign seller to the agent that establishes that the agent is not the seller and that the payments are *bona fide* buying commissions. If the importer cannot meet the evidentiary requirements, then the purported buying commissions are not considered to be *bona fide* buying commissions.

As previously discussed, 19 CFR 177.9(d) contains the provisions for the modification or revocation of ruling letters. Under 19 CFR 177.9(d)(2) the modification or revocation of a ruling letter cannot be applied if certain conditions are present. One of the conditions is that the ruling was originally issued with respect to a prospective transaction. In this case, HRL 544155 was not issued with respect to a prospective transaction. Rather, HRL 544155 was internal advice that was issued to the Deputy Assistant Regional Commissioner for the Northeast Region with respect to completed transactions.

The importer was clearly on notice of this evidentiary requirement contained in the Clarification, given the fact that its counsel submitted a letter inquiring about the impact of the Clarification on the importer's transactions. However, the importer chose to withdraw its request that Customs rule on the applicability of the Clarification before Customs could rule.

In sum, HRL 544155 is modified to include the application of the Clarification as discussed in this letter. The modification is effective as of October 16, 1989.

Holding:

The Statement of Clarification for T.D. 85-111 applies to the importer's entries on or after October 16, 1989. HRL 544155 is modified to incorporate the application of the Statement of Clarification.

JOHN DURANT,
Director,
Commercial Rulings Division.

(C.S.D. 91-11)

This ruling addresses the U.S. Customs Service interpretation and implementation of newly enacted Public Law 101-382 (section 484E) which amends section 466, Tariff Act of 1930, as amended (19 U.S.C. 1466), by inclusion of a new paragraph (h) to the statute (19 U.S.C. 1466(h)), which sets forth conditions under which duty imposed by subsection (a) shall not apply.

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, March 6, 1991.

File: HQ 111474
VES-13-18-CO:R:IT:C 111474 GEV
Category: Carriers

EDWARD L. MERRIGAN, ESQ.
6000 Connecticut Avenue, N.W.
Washington, DC 20815-4238

Re: Policy regarding 19 U.S.C. 1466(h) spare parts; retroactive effect on pending customs cases.

DEAR MR. MERRIGAN:

This is in response to your letter of January 14, 1991, referencing our letter to you dated December 21, 1990 (111280 LLB) regarding Customs interpretation and implementation of the newly-enacted Public Law 101-382 (section 484E). There are two matters in our letter to which you take exception and you therefore request that we give them further consideration.

Facts:

On August 20, 1990, the President signed into law Pub. L. 101-382, section 484E of which amends section 466, Tariff Act of 1930, as amended (19 U.S.C. 1466), by adding a new paragraph (h) to the statute (19 U.S.C. 1466(h)).

The new section 1466(h) provides that:

(h) The duty imposed by subsection (a) of this section shall not apply to—

> (1) the cost of any equipment, or any part of equipment, purchased for, or the repair parts or materials to be used, or the expense of repairs made in a foreign country with respect to, LASH (Lighter Aboard Ship) barges documented under the laws of the United States and utilized as cargo containers, or
>
> (2) the cost of spare repair parts or materials (other than nets or nettings) which the owner or master of the vessel certifies are intended for use aboard a cargo vessel, documented under the laws of the United States and engaged in the foreign or coasting trade, for installation or use on such vessel, as needed, in the United States, at

> sea, or in a foreign country, but only if duty is paid under appropriate commodity classifications of the Harmonized Tariff Schedule of the United States upon first entry into the United States of each such spare part purchased in, or imported from, a foreign country.

The effective date of the amendment is stated as follows:

> Effective Date. — The amendment made by this section shall apply to—

(1) any entry made before the date of enactment of this Act that is not liquidated on the date of enactment of this Act, and
(2) any entry made—
(A) on or after the date of enactment of this Act, and
(B) on or before December 31, 1992.

Based upon the language of these new provisions of law, you provided advice to your clients, outlined in your letter to us dated August 28, 1990, and asked that we determine whether the Customs Service is in accord with that advice. By letter dated December 21, 1990 (111280 LLB) we provided you with the comments you requested. You now take exception to the following two matters addressed in our December 21 letter.

The first matter of concern is the spare parts exemption. You reference the second paragraph on page 4 of our letter of December 21 which states in part that "* * * the cost of imported parts and materials upon which duties have previously been paid under the Harmonized Tariff Schedule of the United States will not be subject to vessel repair duties." While we are both in accord with this basic premise, you take exception to the last sentence of the same paragraph which states in part that, "This benefit * * * is subject to proof of *prior importation* and duty payment." (emphasis added)

You state that this limitation is unsustainable because it fails to take into account the Senate Finance Committee Report (S. Rept. 101-252) which is reflected in the wording of section 1466(h) which states that the duty exemption becomes operative to those parts which are duty-paid under the appropriate commodity classification of the Harmonized Tariff Schedule of the United States "upon *first entry* into the United States of each such spare part purchased in, or imported from, a foreign country." (emphasis added)

It is apparent that the points of contention/confusion are the terms "prior importation" and "first entry." This distinction, however, is merely a question of semantics. Obviously, a foreign part being entered for the first time is not susceptible of proof of prior importation. We agree with your statement that spare parts purchased by a U.S.-flag vessel during a foreign voyage are exempt under 19 U.S.C. 1466(h) if duty is paid on those parts under the appropriate HTSUSA commodity classification "at the time of their first entry into the United States" on board that vessel provided the parts are not installed on that vessel. We also agree that spare parts previously imported into the United States by air

or other vessel and later placed aboard a U.S.-flag vessel for use, are likewise exempt under 19 U.S.C. 1466(h) if duty under the appropriate HTSUSA commodity classification was paid "upon first entry into the United States" by air or aboard the first mentioned vessel.

The second point with which you take exception is in regard to the retroactive impact of 19 U.S.C. 1466(h) on pending Customs cases involving entries made before the August 20, 1990, date of enactment. Specifically, you object to the last paragraph of our December 21, 1990, letter which states:

> "The final statement is also generally correct. The benefits of the new law will be applied to all entries which were not *finally liquidated* on or before August 20, 1990. Exception is taken, however, to the definition of the phrase "*finally liquidated*" appearing in the incoming request for ruling. It is stated that an entry would not be considered finally liquidated if " * * * duty thereon under 19 U.S.C. 1466 remained 'unpaid' because of pending administrative or judicial proceedings." *Customs does not consider that payment of final liquidation amount bears any relation to the liquidation of an entry. Under the Customs Regulations (19 C.F.R. 159.9(C)), except for entries liquidated by operation of law. entries are considered to be liquidated on the date stamped on the bulletin notice of liquidation, which coincides with the date that notice is posted or lodged in the Customhouse.*" (Emphasis Supplied).

In noting your objection to our position as stated above, you reiterate the position on this matter as espoused in your letter of August 28, 1990; that is, the term "liquidated" as used in 19 U.S.C. 1466(h) is intended to mean "finally liquidated" and an entry is not "finally liquidated" if it is still the subject of administrative or judicial proceedings. In support of this position you cite the following: a statement of Senator Breaux to this effect (*Congressional Record,* April 20, 1990, p. S4715); section 514(a) of the Tariff Act of 1930 (15 U.S.C. 1514(a)) which provides, in part, that the liquidation of an entry shall be final unless a protest is timely filed, or if a court action is filed to contest denial of a protest; and *Hambro Automotive Corp. v. United States,* 603 F.2d 850, 853 (CCPA, 1979); *United States v. Desiree Intern USA Ltd.,* 497 F.Supp. 264, 265 (D.C. N.Y., 1980); and *Computime, Inc. v. United States,* 622 F.Supp. 1083 (CIT 1985).

Upon further review of this matter we are in accord with the position as stated by Senator Breaux that the new amendments to section 1466 "* * * are intended to apply to any entry made prior to the date of enactment of [this Act] which is not finally liquidated when the bill becomes law." Accordingly, for purposes of the retroactive impact of new section 1456(h) the benefits of said legislation will inure to those entries which

were not finally liquidated (i.e., for which no timely protest was filed or court action initiated) on or before August 20, 1990.

STUART P. SEIDEL,
(for Harvey B. Fox, Director,
Office of Regulations and Rulings.)

(C.S.D. 91-12)

This ruling holds that an unlicensed individual with an individual broker's license may be employed by more than one customs broker if the work for each broker is performed at that broker's office during prescribed non-concurrent hours. A licensed individual with an individual broker's license may be employed by more than one customs broker at each brokers office when the individual serves as the qualifying employee for the permit, but not the license (19 CFR 111.3(6), 19 CFR 111.11(b) and (c), 19 CFR 111.19(d)).

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, March 8, 1991.

File: HQ222573
BRO-2-01-CO:R:C:E 222573 PH
Category: Brokers

HARVEY A. ISAACS, ESQ.
TOMPKINS & DAVIDSON
One Whitehall Street
New York, New York 10004

Re: Employees of customhouse brokers; Employment by more than one broker; 19 U.S.C. 1641; 19 CFR 111.11(d); 19 CFR 111.19(d).

DEAR MR. ISAACS:

In your letter of July 19, 1990, on behalf of the National Customs Brokers and Forwarders Association of America, Inc., you request a ruling on certain understandings you have regarding the circumstances under which an employee may work for more than one licensed broker. Our ruling follows.

Facts:

The inquirer seeks clarification regarding the circumstances in which an employee may work for more than one licensed broker. The inquirer requests a ruling on a number of understandings on this issue. These understandings are set forth below in the form of issues.

Issues:

(1) May an unlicensed employee work for more than one broker if the work is performed at each broker's office during prescribed hours (e.g.,

from 9:00 AM to 5:00 PM for broker "A" and from 6:00 PM to 11:00 PM for broker "B")?

(2) May an employee qualifying the permit for one broker be employed by another broker under the circumstances outlined in ISSUE 1 if the employee is not also the qualifying licensee of the second broker?

(3) Is an employee employed under the circumstances outlined in ISSUES 1 and 2 authorized to sign customs documents for one or both of the licensees under 19 CFR 111.3(b)(1) and conduct other business on behalf of either or both brokers under 19 CFR 111.3(b)(2) if it is done during the course of the employee's employment?

Law and Analysis:

The statutory provision governing customs brokers is found in section 641, Tariff Act of 1930, as amended (19 U.S.C. 1641). Licenses for customs brokers are provided for in paragraph (b) of this provision (19 U.S.C. 1641(b)). Licenses for individuals are granted under 19 U.S.C. 1641(b)(2) and licenses for corporations, associations, or partnerships are granted under 19 U.S.C. 1641(b)(3). Pursuant to the latter provision, "at least one officer of the corporation or association, or one member of the partnership" must hold a valid individual customs brokers license. Under 19 U.S.C. 1641(b)(4), a customs broker, defined in 19 U.S.C. 1641(a)(1) as "any person granted a customs broker's license * * * under [19 U.S.C. 1641(b)]", "shall exercise responsible supervision and control over the customs business that it conducts."

The Customs Regulations pertaining to customs brokers are found in Part 111 of the Customs Regulations (19 CFR Part 111). Under 19 CFR 111.2, a person is required to obtain a customs brokers license to transact the business of a broker and a separate permit is required for each Customs district in which a licensee conducts customs business. Under paragraphs (b) and (c) of section 111.11, a partnership, association, or corporation must have at least one member (in the case of a partnership) or officer (in the case of an association or corporation) who is a licensed broker. Also under these provisions, the partnership, association, or corporation must establish that it will have an office in the Customs district where it has applied for a permit in which its customs transactions will be performed by a licensed member of the partnership (if the broker is a partnership), or a licensed officer (if the broker is an association or a corporation), or by an employee under the responsible supervision and control of the licensed member or officer.

Each person granted a customs broker's license is required, under 19 CFR 111.19, to have a permit for the district in which the broker operates. Under 19 CFR 111.19(d), a customs broker must employ within each district for which a permit is granted at least one individual having an individual broker's license, except as authorized by a waiver under 19 U.S.C. 1641(c)(2) and 19 CFR 111.19(d).

The term "responsible supervision and control" is defined very broadly in 19 CFR 111.11(d). The term is defined as meaning, in part, "that degree of supervision and control necessary to ensure that the

employee provides substantially the same quality of service in handling customs transactions that the licensed broker is required to provide * * *." Failure to exercise such responsible supervision and control over the custom business conducted by the customs broker and over its employees requiring such supervision may result in the cancellation of the customs brokers license or permit (see 19 CFR 111.53(c)).

Under 19 CFR 111.3(b), an employee of a customs broker acting solely for his or her employer is not required to be licensed if:

> (1) * * * The broker has authorized the employee to sign Customs documents on his [or her] behalf, and has executed a power of attorney for that purpose. * * *; or
>
> (2) * * * The broker has filed with the district director a statement identifying the employee as authorized to transact business on his [or her] behalf. * * *
>
> Where the employee is given authority under either paragraph (b)(1) or (2) of this section, the broker must promptly give notice of the withdrawal of authority of any such employee and must exercise such supervision of his [or her] employees as will insure proper conduct on the part of the employees in the transaction of Customs business. Each broker will be held strictly responsible for the acts or commissions of his [or her] employees within the scope of their employment, and for acts or omissions of such employees which, in the exercise of reasonable care and diligence, the broker should have foreseen.

In the first issue under consideration, an unlicensed employee would work for more than one customs broker at the office of each broker during prescribed, non-concurrent hours. We see no objection to such an arrangement, *provided* that the requisite responsible supervision and control over the employee is exercised, as required by 19 U.S.C. 1641(b)(4) and 19 CFR 111.11(b) and (c) and 111.19(d). As stated above, such responsible supervision and control must ensure that the employee provides substantially the same quality of service in handling customs transactions that a licensed broker is required to provide.

In the second issue under consideration, a licensed employee would work for more than one customs broker at: the office of each broker during prescribed, non-concurrent hours, *and* the employee would be the qualifying employee for the permit of one of the brokers. In interpreting the statutory and regulatory provisions described above, it is the position of the Customs Service that an individually licensed customs broker may be the qualifying employee for the permit of only one broker (except as authorized by a waiver under 19 U.S.C. 1641((c)(2) and 19 CFR 111.19(d)). An employee, whether or not licensed with an individual broker's license, while employed by the broker for which he or she is not the qualifying employee, must be subject to the responsible supervision and control required by 19 U.S.C. 1641(b)(4) and 19 CFR 111.11(b) and (c) and 111.19(d). In view of this requirement for responsible supervision and control, we conclude that a licensed individual who serves as

the qualifying employee for the permit of one broker may be employed by another broker as a *non*-qualifying employee (i.e., a *supervised* employee), *provided* that the work is performed at each broker's office during prescribed, non-concurrent hours. However, we emphasize that this ruling provides no defense to a charge of failure to exercise responsible supervision and control over the broker's office for which the licensed individual qualifies the permit if the licensed individual also works for a second broker in a supervised capacity.

The third issue raises the question of whether an employee employed under the arrangements discussed above may sign customs documents for, and conduct other business on behalf of, one or both of the customs brokers under 19 CFR 111.3(b) during the course of the employee's employment. Provided that the requirements in 19 CFR 111.3(b) are met and that the requisite responsible supervision and control is exercised over the unlicensed employee, and the licensed employee while he or she is employed by the broker for which he or she is not the qualifying employee, such an employee may sign customs documents for, and conduct other business on behalf of, one or both of the customs brokers. These actions (i.e., signing customs documents and conducting other business) may only be performed during the course of the employee's employment by the customs broker on behalf of which they are performed and at the office of the broker on behalf of which they are performed during the prescribed, non-concurrent hours during which the employee is by that broker.

Holdings:

(1) An individual who is not licensed with an individual broker's license may be employed by more than one customs broker if the work for each broker is performed at that broker's office during prescribed, non-concurrent hours, *provided* that the responsible supervision and control required by 19 U.S.C. 1641(b)(4) and 19 CFR 111.11(b) and (c) and 111.19(d) is exercised over the employee.

(2) An individual who is licensed with an individual broker's license may be employed by more than one customs broker at each broker's office when the individual serves as the qualifying employee for the *permit* (*but not the license*) of one of the brokers, *provided* that:

(a) the responsible supervision and control required by 19 U.S.C. 1641(b)(4) and 19 CFR 111.11(b) and (c) and 111.19(d), is exercised over the employee in his or her employment by the customs broker for which he or she does not serve as the qualifying employee; and

(b) the hours of employment of the individual for each broker are prescribed and non-concurrent.

(3) An employee employed under the circumstances approved in *Holdings* 1 and 2 may sign customs documents for, and conduct other business on behalf of, one or both of the customs brokers by which he or she is employed, *provided* that the requirements in 19 CFR 111.3(b) are met and that, as required by 19 U.S.C. 1641(b)(4) and the Customs Regulations issued thereunder, the requisite responsible supervision

and control is exercised over the unlicensed employee, and the licensed employee while he or she is employed by the broker for which he or she is not the qualifying employee. The employee may only perform these actions during the course of the employee's employment by the customs broker on behalf of which they are performed and at the office of the broker on behalf of which they are preformed during the prescribed, non-concurrent hours during which the employee is employed by that broker.

JOHN DURANT,
Director,
Commercial Rulings Division.

(C.S.D. 91-13)

This ruling holds that all merchandise is subject to duty upon importation into the United States except if covered by a specific exemption. Production equipment as defined in the *Nissan* decisions (22 Cust. Bull., No. 39, p. 27 and 23 Cust. Bull., No. 39, p. 3) does not fall within any of the Foreign Trade Zone Act exemptions. Capital equipment such as the instant production equipment is subject to duty upon its importation into the United States and before it is admitted into a foreign trade zone (48 Stat. 998, 19 U.S.C. 81a through 81u, 19 CFR 141.1).

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC March 12, 1991.

File: HQ 222874
FOR-2-01-CO:R:C:E 222874 CB
Category: Entry

DAVID R. OSTHEIMER, ESQ.
LAMB & LERCH
233 Broadway
New York, New York 10279

Re: Request for binding ruling relative to payment of duties on merchandise admitted into a foreign trade zone

DEAR MR. OSTHEIMER:

This is in response to your letter of December 7, 1990, on behalf of Trade Zone Operations, Inc., wherein you requested a binding ruling clarifying the time at which duties must be deposited on merchandise admitted into a General Purpose Foreign Trade Zone (FTZ).

Facts:

General Purpose FTZ #9 is presently comprised of three separate sites, one of which is known as the Campbell Industrial Park. Your

client has been designated the FTZ Operator for this FTZ. At the present time, your client wishes to activate a specific area within the Campbell Industrial Park. The area for which activation is being requested is leased to AES Barbers Point (AES-BP). AES-BP plans to operate a co-generation facility at this site which will ultimately convert chemical energy in the form of coal into electricity to be sold to the Hawaiian Electric Company for use by its customers on Oahu. AES-BP will be purchasing, from various vendors, imported foreign status merchandise (such as a turbine-generator) which needs to be assembled and tested prior to its utilization as production equipment at the co-generation facility. The imported foreign status merchandise will be arriving at the General Purpose FTZ in shipments over an extended period of time. You have stated that the merchandise will be stored and assembled by AES-BP's vendors within the General Purpose FTZ and must, prior to its actual use as production equipment, be tested for the purpose of determining its suitability for use as production equipment.

Subsequent to your initial ruling request, a conference was held on January 28, 1991, to discuss the timing of the payment of customs duties. During the course of the meeting, you introduced the concept of constructive transfer of the equipment once it is installed. It is your position that 19 CFR 146.52 requires the filing of a Customs Form (CF) 216 with the District Director requesting permission to commence the intended activity. Thus, prior to actually utilizing any of the foreign status merchandise as production machinery or capital equipment, a CF 216 must be signed by both the Zone Operator and the Grantee and must be approved by Customs, thereby assuring that all parties will be placed on notice prior to utilization of the equipment. Furthermore, prior to approving the CF 216 Customs can require the filing of a consumption entry which would constructively transfer the capital equipment into the customs territory.

Issue:

When must duties be deposited on imported articles admitted into a General Purpose FTZ, when such articles are to be used as production equipment within the General Purpose FTZ?

Law and Analysis:

The statute governing the creation and operation of foreign trade zones is the Foreign Trade Zones Act of 1934, as amended (48 Stat. 998; 19 U.S.C. § 81a through § 81u). Pursuant to the provisions of section 3 of the Foreign Trade Zones Act, as amended (19 U.S.C. § 81c), merchandise of every description may be brought into a zone without being subject to the Customs laws for the purposes set forth in the statute. Merchandise may "be brought into a zone and may be stored, sold, exhibited, broken up, repacked, assembled, distributed, sorted, graded, cleaned, mixed with foreign or domestic merchandise, or otherwise manipulated, or be manufactured.* * *" 19 U.S.C. § 81c (1982).

It is your opinion that the storage, assembly and testing of foreign status merchandise which subsequently becomes production

machinery or capital equipment are activities clearly delineated and permitted under the FTZ Act. Moreover, that the merchandise does not become subject to the deposit of customs duties until such time as it is determined to be suitable for its intended use and is actually used.

In C.S.D. 79-418 the Customs Service ruled that foreign production equipment may not be brought into a zone for use as production equipment. This ruling was issued by the Customs Service notwithstanding the decision in *Hawaiian Independent Refinery v. U.S.,* 81 Cust. Ct. 117, CD 4777 (1978), appeal dismissed 66 C.C.P.A. 135 (1979), wherein the Court of International Trade held that merchandise which does not actually enter the customs territory of the United States is not dutiable. C.S.D. 79-418 was based on the premise that production equipment is not merchandise as that tern is used in the Foreign Trade Zones Act. It was concluded that "[g]iven the common understanding of the term 'merchandise', we believe that Congress deliberately used that more limited term in the Foreign Trade Zones Act to avoid this very conduct."

The issue of the importation of production equipment into an FTZ was most recently addressed by the Court of International Trade in *Nissan Motor Mfg. Corp., U.S.A. v. United States,* Slip Op. 88-108 (CIT), 22 Cust. Bull., No. 39, p. 27. In the *Nissan* case the court held, under facts similar to the instant case, that production equipment is not "merchandise" entitled to the duty exemption of Section 3 of the Tariff Act of 1930 (the Act). The court based its decision on the exclusive language of the statute (19 U.S.C. 81c) and its legislative history. The court was not persuaded to the view that *Hawaiian Independent Refinery* was relevant to the facts then in question. In affirming the lower court's decision, the United States Court of Appeals for the Federal Circuit reached the same conclusion. *Nissan Motor Mfg. Corp. USA v. United States,* Appeal No. 89-1040, 23 Cust. Bull., No. 39, p. 3. The *Nissan* opinion is directly applicable to the instant set of facts.

Based on the *Nissan* opinion, Customs issued a General Notice revoking C.S.D. 82-103 which had held that the payment of duty could be deferred until production equipment introduced into a FTZ became operational. It is your position that Customs interpretation of the *Nissan* decision is incorrect and that there was no need to revoke C.S.D. 82-103. You read the *Nissan* holding as standing solely for the proposition that production equipment used in an FTZ is ultimately subject to duty. You do not read the decision as requiring the deposit of duties at the time of importation of an article into a FTZ.

We disagree with your interpretation. As stated by the Court of Appeals in *Nissan,* Congress "signalled its intention to make the imposition of immediate duties dependent on the operations that occur in a foreign trade zone when it listed the activities that could be performed on merchandise brought into a zone. The fact that a comprehensive listing is set forth in the statute indicates that Congress did not intend a blanket exclusion from Customs duties irrespective of what is done with

the imported merchandise." 23 Cust. Bull. 39, at page 6. In its decision, the court affirmed Customs interpretation of the Foreign Trade Zones Act as published in C.S.D. 79-418. The court concluded that "[u]nder the plain language of the 1950 amendment to the Act and the legislative history of that amendment, and Customs' published decision interpreting the Act as amended, such a use does not entitle the equipment to exemption from Customs duties." 23 Cust. Bull. 39, at page 7. It is the Customs Service opinion that the court's holding has resolved the question of production equipment in foreign trade zones. The *Nissan* appellate court found that certain operations were outside any benefits conferred by the Foreign Trade Zones statute. The court expressly found that there was no authority to allow imported articles to be "installed," "used," "operated," or "consumed." The Customs position that production equipment, supplies, and building materials were dutiable upon entry and were not entitled to be considered as merchandise was developed in accordance with public notice and comment. Even if Customs believed its position was wrong despite the favorable court decisions, any reversal of that position could only be accomplished by adherence to that same procedure.

Regarding your contention that the obligation to deposit customs duties does not arise until such time as the equipment is put to its intended use, it is the Customs Service position that the intended use is established at the time of importation. Therefore, the requirement to deposit customs duties must be satisfied at such time. The post-importation use of an article must be considered if that use has a bearing on its tariff treatment. *Vandegrift & Co. v. United States,* 15 Ct. Cust. Appls. 165, T.D. 42221 (1927); *Leonard Levin Co. v. United States,* 27 C.C.P.A. 101, CAD 69 (1939). An analogy may be drawn between the instant facts and a temporary importation under bond (TIB). The Customs Regulations provide that the entry summary for articles brought into the United States under a TIB must include a declaration that the goods are not imported for sale or sale upon approval. Furthermore, the Harmonized Tariff Schedule (HTSUSA), Subchapter XIII, U.S. Note 1(a) speaks to the intent of the importer at the time the entry is filed. There must be a definite intent on the part of the importer at the time of importation that the articles shall be used in a manner contemplated by the provision of law under which entry is claimed and that the articles shall be exported within the bond period. If a sale was intended before entry the entry would be in violation of section 592 of the Tariff Act of 1930. In the instant case, you intend to use the articles as production equipment once it is installed. The use to which the articles will be put is not in question. The articles are imported as capital or production equipment and will be used as such. Hence, the articles must be imported as capital or production equipment and estimated duties must be deposited at the time of entry. "Duties and the liability for their payment accrue upon imported merchandise on arrival of the importing vessel * * *, unless otherwise specially provided for by law." 19 CFR 141.1. A construction which

ignores the adjectives "production" and "building" with respect to equipment or materials that are imported with the intent to be installed in a zone and then used in that zone would be contrary to that principle and the courts' findings in the *Nissan* litigation. That court concluded that Customs lacked authority to put conditions in a zone grant that were not imposed by the Foreign Trade Zones Board.

Concerning your constructive transfer proposal, you cite 19 CFR 146.61 to indicate that the Customs regulations provide for the constructive transfer of merchandise which remains physically in the zone. However, section 146.61 falls under Subpart F "Transfer of Merchandise from a Zone." Subpart F sets forth the procedure for the entry of merchandise which is to be transferred from a zone, or removed from a zone for exportation or transportation to another port, for consumption or warehouse. In the instant case, the production equipment will always physically remain in the zone. There is no intention of transferring the equipment into the Customs territory. The concept of constructive transfer was adopted by the Customs Service "to provide relief in those instances where merchandise was expressly intended to be physically moved into Customs territory and not as to merchandise which could not be, and was never intended to be, physically moved [into the Customs territory].* * *" *See* P.R.D. 75-5; 9 Cust. Bull. 746, 749 (1975). The court in *Hawaiian Independent Refinery* rejected the argument that foreign merchandise that is "consumed" in a zone can be considered to have been "constructively transferred" to the Customs territory. It held that no authority is anywhere conferred upon Customs to require the involuntary constructive transfer of merchandise which is never intended to, and which does not actually enter, the Customs territory from a zone. 81 Cust. Ct. 117, 125.

It is not within the Customs Service authority to grant a postponement or deferment of the statutorily required deposit of estimated duties. However, you may wish to explore the possibility of petitioning the Foreign Trade Zones Board to allow the entry of the articles as privileged foreign merchandise and, thereby, locking into a tariff classification and rate of duty. The Board can place a restriction on the zone grant that duties must be paid before the co-generation facility is activated. Payment of duties will be postponed until such time as the production equipment is actually put to its intended use.

Holding:

All merchandise is subject to duty upon importation except if covered by an exemption. The *Nissan* decisions held that production equipment does not fall within any of the Foreign Trade Zones Act exemptions. Therefore, production equipment is subject to duty upon its importation and before it is admitted into a FTZ.

JOHN DURANT,
Director,
Commercial Rulings Division.

U.S. Customs Service

Proposed Rulemakings

19 CFR Parts 19, 113, and 144

RIN-1515-AA22

PROPOSED CUSTOMS REGULATIONS AMENDMENTS RELATING TO DUTY-FREE STORES

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Proposed rule.

SUMMARY: This document proposes to amend the Customs Regulations to designate duty-free stores as a new class of Customs bonded warehouse, establish procedures for the administration of these facilities, and incorporate duty-free store operating procedures into the regulations. These changes are necessary to implement section 1908 of the Omnibus Trade and Competitiveness Act of 1988 (Public Law 100-418).

DATE: Comments must be received on or before July 16, 1991.

ADDRESS: Comments (preferably in triplicate) must be submitted to and may be inspected at the Regulations and Disclosure Law Branch, U.S. Customs Service, 1301 Constitution Avenue, NW., Room 2119, Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT: Pat Duffy or Mike Brengle, Office of Cargo Enforcement and Facilitation, (202-566-8151).

SUPPLEMENTARY INFORMATION:

Background

Duty-free stores are Customs bonded warehouses operating under special procedures whereby merchandise is offered for sale to departing travelers without payment of Customs duties and taxes, on condition that the merchandise will be exported by and with them from the United states. These stores were first established in the late 1950's at airports in the United States and on land borders with Mexico and Canada. At present, there are approximately 125 duty-free stores operating throughout the United States, 43 of which are on the Canadian border, 33 at the Mexican border and 49 at U.S. international airports.

Duty-free stores have been administered since their inception through U.S. Customs administrative directives, rather than through

any specific law or regulation. The Customs Service drafted regulations for the administration of duty-free stores in 1984. However, the draft regulations were never published as a Notice of Proposed Rulemaking, because Congress inserted a provision in Public Law 98-473 (Continuing Appropriations for Fiscal Year 1985) prohibiting the use of Customs funds made available by that Act or any other Act to propose or promulgate any rules or regulations relating to duty-free stores until Congress legislated in the matter. This provision was deemed by Customs to constitute a continuing prohibition in subsequent Customs appropriations unless it was specifically terminated. See 51 FR 24535 of July 7, 1986.

Congress did not legislate concerning duty-free stores until enactment of section 1908 of the Omnibus Trade and Competitiveness Act of 1988 (Public Law 100-418; August 23, 1988). Section 1908 amended section 555(b) of the Tariff Act of 1930 (19 U.S.C. 1555(b)) to authorize the establishment and operation of duty-free stores in accordance with the provisions of the law and such regulations as the Secretary of the Treasury may prescribe.

In a recent development, a private firm has sought approval of a duty-free store for sales to passengers boarding cruise vessels at seaports. Unlike airport and land border locations, the Customs Service has never established any nationwide procedures for seaport duty-free stores. However, such stores are included within the meaning of "border stores" under section 555(b)(8)(B), as recently amended.

To carry out the provisions of 19 U.S.C. 1555(b) and to regulate seaport duty-free stores, this rulemaking has been initiated. Some of the procedures in the proposal are carried over from Customs administrative directives (Manual Supplement 3265-02 and Customs Directive 3260-04). Also, the regulations which apply to all bonded warehouses generally would, of course, continue to apply to duty-free stores unless specifically preempted by the proposed regulations. Duty-free stores approved by Customs as of August 23, 1988, shall be brought into compliance with the proposed regulations within 60 days after their approval in final form.

The principal features of section 1555(b) with respect to which implementing regulations are proposed are as follows:

1. Duty-free stores are authorized to be established anywhere within the port of entry from which a purchaser will depart or within 25 miles of the exit point of the purchaser from the United States.

2. Duty-free store operators will establish procedures to assure exportation of the merchandise. Sales by airport stores are restricted to personal-use quantities. There are no quantity restrictions on border sites.

3. Goods purchased in duty-free stores are not eligible for the personal exemption from duty if reimported. Customs may impose marking requirements to identify duty-free store merchandise upon reimportation, if there has been a pattern of undeclared reimportations.

4. Airport duty-free stores will deliver merchandise (1) to the purchaser in a sterile airport area, (2) to the purchaser at the exit point (gate

holding area) of a departing flight, (3) to the aircraft, or (4) if any of the foregoing methods have failed ("no-show" passengers), by any other reasonable method to effect delivery for exportation.

5. Border duty-free store operators will deliver merchandise (1) to the purchaser beyond the exit point, or (2) to the purchaser at any location approved by Customs before August 23, 1988 (date of enactment of the Trade Act).

6. Domestic or duty-paid goods may be brought into duty-free store bonded sales or crib areas for sale, but may not be placed in bonded storage areas. However, they must be marked to distinguish them from the duty-free merchandise.

In addition, regulations are proposed under the authority of section 1555(b) in the following areas:

1. Procedures for the operation of seaport duty-free stores are established.

2. The blanket permit procedures to withdraw merchandise from duty-free stores, as well as vessel and aircraft supply stores and diplomatic stores, currently allowed under Customs administrative directives, will now be authorized by regulation.

3. Sign, sales ticket, and recordkeeping requirements are established for duty-free stores.

4. The warehouse fee suspension authorized in section 9501 of the Omnibus Budget Reconciliation Act of 1987 (19 U.S.C. 58c) is acknowledged by deleting the regulatory section on warehouse fees.

5. Certain provisions applicable not only to duty-free stores, but also to other bonded warehouses are specifically referenced as being generally applicable to all bonded warehouses.

Proposal

In order to better administer the duty-free store program, Customs proposes to amend Parts 19, 113, and 144, Customs Regulations (19 CFR Parts 19, 113, and 144), in the following manner:

1. Establish duty-free stores as Class 9 Customs warehouses in section 19.1(a);

2. Revise section 19.2(a) to include documentation needed to support applications for new duty-free stores;

3. Merge section 19.2(C) and (d) to specify the bond requirements of all new bonded warehouses, including Class 9 warehouses, upon approval of the warehouse application;

4. Revise section 19.3(e) to include a new ground for warehouse suspension or revocation specific to Class 9 warehouses;

5. Delete and reserve section 19.5;

6. Revise section 19.6(d) to allow for blanket permits upon entry acceptance for withdrawals of merchandise from duty-free stores, vessel and aircraft supply stores, and diplomatic stores, without further approval by Customs:

7. Amend section 19.11 by revising paragraph (c) and by adding a new paragraph (h) thereto to allow duty-free stores to unpack goods into

saleable units without the need for an application to and permit by Customs;

8. Revise section 19.12(a)(3) to allow the consolidation of duty payments owed on thefts and shortages from bonded warehouses;

9. Revise section 19.12(a)(4) to allow a proprietor of a bonded warehouse, including a duty-free store, to file the permit file folder with Customs within 30 days from the final withdrawal of the merchandise covered by the entry;

10. Add a new paragraph (a)(8) to section 19.12 to authorize the implementation of automated data processing systems by warehouse proprietors;

11. Add new sections 19.35, 19.36, 19.37, 19.38 and 19.39 to set forth requirements for, limitations upon, and operating procedures for, duty-free stores;

12. Revise section 113.63 by adding a new paragraph (c)(5) to the custodial bond agreement wherein the proprietor agrees to provide reasonable assurance of exportation of duty-free store merchandise; and

13. Add a new paragraph (h) to section 144.37, setting forth the procedures governing withdrawals of merchandise from duty-free stores for exportation under a sales ticket procedure.

COMMENTS

Before adopting this proposal, consideration will be given to any written comments (preferably in triplicate) that are timely submitted to Customs. Comments submitted will be available for public inspection in accordance with the Freedom of Information Act (5 U.S.C. 552), § 1.4 Treasury Department Regulations (31 CFR 1.4), and § 103.11(b), Customs Regulations (19 CFR 103.11(b)), during regular business days between the hours of 9:00 a.m. and 4:30 p.m. at the Regulations and Disclosure Law Branch, Room 2119, Customs Headquarters, 1301 Constitution Avenue, NW., Washington, D.C. 20229.

REGULATORY FLEXIBILITY ACT

Pursuant to the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), it is hereby certified that the proposed amendments set forth in this document, if adopted, will not have a significant economic impact or a substantial number of small entities. Accordingly, they are not subject to the regulatory analysis or other requirements of 5 U.S.C. 603 and 604.

EXECUTIVE ORDER 12291

This document does not meet the criteria for a "major rule" as specified in section 1(b) of E.O. 12291. Accordingly, a regulatory impact analysis is not required.

PAPERWORK REDUCTION ACT

The collection of information contained in this notice of proposed rulemaking has been approved by the Office of Management and Budget (OMB) under 1515-0121, Establishment of Bonded Warehouses.

Duty-free stores have long existed in this regard under established administrative practice. This notice of proposed rulemaking is intended to specifically include duty-free stores in the Customs Regulations as a separate class of bonded warehouse, and does not change the information collection burden with respect thereto.

The collection of information in this proposed revision is in §§ 19.2, 19.6, 19.11, 19.12, 19.36, 19.37, 19.38, 19.39 and 144.37. This information is necessary to assure the exportation of merchandise from duty-free stores, and to otherwise implement the requirements of law and protect the revenue. Comments concerning the accuracy of the existing burden estimate and suggestions for reducing this burden should be directed to the Office of Management and Budget, Attention: Desk officer for the Department of the Treasury, Office of Information and Regulatory Affairs, Washington, D.C. 20503, with copies to the U.S. Customs Service at the address previously specified.

Drafting Information

The principal author of this document was Russell Berger, Regulations and Disclosure Law Branch, U.S. Customs Service. However, personnel from other offices participated in its development.

List of Subjects

Part 19

Customs duties and inspection, Imports, Exports, Warehouses.

Part 113

Customs bonds.

Part 144

Customs duties and inspections, Imports, warehouse.

Proposed Amendment

It is proposed to amend Parts 19, 113 and 144, Customs Regulations (19 CFR Parts 19, 113 and 144), as set forth below.

PART 19—CUSTOMS WAREHOUSES, CONTAINER STATIONS AND CONTROL OF MERCHANDISE THEREIN

1. The authority citation for Part 19 would be revised to read as follows:

Authority: 5 U.S.C. 301, 19 U.S.C. 66, 1202 (General Note 8, Harmonized Tariff Schedule of the United States), 1624;

§ 19.1 also issued under 19 U.S.C. 1311, 1312, 1555, 1556, 1557, 1560, 1561, 1562;

§ 19.6 also issued under 19 U.S.C. 1555;

§ 19.7 also issued under 19 U.S.C. 1555, 1556;

§ 19.11 also issued under 19 U.S.C. 1556, 1562;

§ 19.15 also issued under 19 U.S.C. 1311;

§ § 19.17-19.25 also issued under 19 U.S.C. 1312;

§ § 19.35-19.39 also issued under 19 U.S.C. 1555;

§ 19.40(a) also issued under 19 U.S.C. 1450, 1499, 1623;
§ § 19.41-19.43 also issued under 19 U.S.C. 1499;
§ 19.44 also issued under 19 U.S.C. 1448;
§ 19.45 also issued under 19 U.S.C. 1551, 1565;
§ 19.48 also issued under 19 U.S.C. 1499, 1623;
§ 19.49 also issued under 19 U.S.C. 1484.

2. It is proposed to amend section 19.1 by adding a new paragraph (a)(9) to read as follows:

§ 19.1 Classes of customs warehouses.

(a) * * *

(9) *Class 9.* Bonded warehouses known as "duty-free stores", used for selling, for use outside the Customs territory, conditionally duty-free merchandise owned or sold by the proprietor and delivered from the Class 9 warehouse to an airport or other exit point for exportation by, or on behalf of, individuals departing from the Customs territory for destinations other than foreign trade zones. Pursuant to 19 U.S.C. 1555(b)(8)(C), "Customs territory", for purposes of duty-free stores, means the Customs territory of the U.S. as defined in § 101.1(e) of this chapter, and foreign trade zones (see Part 146 of this chapter).

* * * * * * *

3. It is proposed to amend section 19.2 by removing the paragraph designations for paragraphs (b)(1), (2), and (3); by adding a phrase at the end of the introductory text of paragraph (b) and adding new paragraphs (1), (2), (3), and (4); by revising paragraph (c), and by removing and reserving paragraph (d) as follows:

§ 19.2 Applications to bond; bond; annual fee.

* * * * * * *

(b) * * * If the application is for I Class 9 warehouse (duty-free store), the applicant shall furnish the following documents:

(1) A map showing the location of the facilities to be bonded in respect to the port of entry and distances to all exit points of purchasers of conditionally duty-free merchandise;

(2) A description of the store's procedures to provide reasonable assurance that conditionally duty-free merchandise sold therein will be exported;

(3) If an airport duty-free store, a description of the store's procedures for restricting sales of conditionally duty-free merchandise to personal-use quantities; and

(4) A statement by an authorized official of the appropriate state, local, or other governmental authority administering the exit point facility that the applicant duty-free store is authorized to deliver conditionally duty-free merchandise to purchasers at or through that exit point facility. A separate statement shall be required for each governmental authority having jurisdiction over exit point facilities through which the duty-free store intends to deliver merchandise to

purchasers. If the merchandise will be delivered through an exit point which is not under the jurisdiction of a governmental authority, the applicant will provide a statement to that effect.

(c) On approval of the application to bond a warehouse of any class, except Class 1, a bond shall be executed on Customs Form 301, containing the bond conditions set forth in § 113.63 of this chapter.

(d) [Reserved].

* * * * * * *

4. It is proposed to amend section 19.3 by adding a new paragraph (e)(9) as follows:

§ 19.3 Bonded warehouse; alterations; relocations; suspensions; discontinuance.

* * * * * * *

(e) * * *

(9) The proprietor of a Class 9 warehouse is or has been unable to provide reasonable assurance that conditionally duty-free merchandise is or was exported in compliance with the regulations in this part.

* * * * * * *

5. It is proposed to delete and reserve section 19.5.

6. It is proposed to amend section 19.6 by revising the section heading and paragraph (d) to read as follows:

§ 19.6 Deposits, withdrawals, blanket permits to withdraw and sealing requirements.

* * * * * * *

(d) *Blanket Permits to withdraw.* (1) *General.* Blanket permits may be used to withdraw merchandise in small quantities from bonded warehouses for:

(i) delivery to individuals departing directly from the Customs territory for exportation under the sales ticket procedure of § 144.37(h) of this chapter (Class 9 warehouses only);

(ii) aircraft or vessel supplies under sections 309 or 317, Tariff Act of 1930, as amended (19 U.S.C. 1309, 1317); or

(iii) the personal or official use of personnel of foreign governments and international organizations set forth in Subpart I, Part 148 of this chapter; or

(iv) a combination of the foregoing. Blanket permits to withdraw may be used only for delivery at the port where withdrawn and not for transportation in bond to another port. Blanket permits to withdraw may not be used for delivery to a location for retention or splitting of shipments under the provisions of § 18.24 of this chapter. A withdrawer who desires a blanket permit shall state in capital letters on the warehouse entry, or on the warehouse entry/entry summary when used as an entry, that “SOME OR ALL OF THE MERCHANDISE WILL BE WITHDRAWN UNDER BLANKET PERMIT PER SECTION 19.6(d) C.R.”

Customs acceptance of the entry will constitute approval of the blanket permit. A copy of the entry will be delivered to the proprietor, whereupon merchandise may be withdrawn under the terms of the blanket permit. The permit may be revoked by the district director in favor of individual applications and permits if the permit is found to be used for other purposes, or if necessary to protect the revenue or properly enforce any law or regulation Customs is charged with administering. Merchandise covered by an entry for which a blanket permit was issued may be withdrawn for purposes other than those specified in this paragraph if a withdrawal is properly filed as required in Subpart D, Part 144 of this chapter.

(2) *Withdrawals under blanket permit.* Withdrawals may be made under blanket permit without any further Customs approval, and shall be documented by placing a copy of the withdrawal document in the proprietor's permit file folder. Each withdrawal shall be filed on Customs Form 7506 or 7505, as appropriate, and shall be consecutively numbered, prefixed with the letter "B". The withdrawal shall specify the quantity and value of each type of merchandise to be withdrawn. Each copy shall bear the summary statement described in § 144.32(a) of this chapter, reflecting the balance of merchandise covered by the warehouse entry. Any joint discrepancy report of the proprietor and the bonded carrier, licensed cartman or lighterman, or weigher, gauger, or measurer for a supplementary withdrawal shall be made on the copy and reported to the district director as provided in paragraph (b)(1) of this section. A copy of the withdrawal shall be retained in the records of the proprietor as provided in § 19.12(a)(2) of this part. Merchandise shall not be removed from the warehouse prior to the preparation of the supplementary withdrawal. If merchandise is so removed, the proprietor shall be subject to liquidated damages as if it were removed without Customs permit.

(3) *Withdrawals under blanket permit from duty-free stores.* Withdrawals under blanket permit from duty-free stores shall be made on the sales ticket described in § 144.37(h) of 16 this chapter. The sales ticket need not contain the summary statement described in § 144.32(a) of this chapter, since the information required is included in the sales ticket register. The sales ticket shall be serially numbered as provided in § 144.37(h)(2) of this chapter.

(4) *Blanket permit summary.* When all of the merchandise covered by an entry on which a blanket permit to withdraw was issued has been withdrawn, including withdrawals made for purposes other than duty-free store delivery, vessel or aircraft supply, or diplomatic use, the proprietor shall prepare a report on a copy of Customs Form 7506, or a form on the letterhead of the proprietor, which provides an account of the disposition of the merchandise covered by the blanket permit. The form shall bear the words "BLANKET PERMIT SUMMARY" in capital letters conspicuously printed or stamped in the top margin. On the form, the proprietor shall certify that the merchandise listed thereunder was

withdrawn in compliance with § 19.6(d), and shall account for all of the merchandise withdrawn under blanket permit by HTSUS Harmonized Tariff Schedule of the United States) number, HTSUS quantity (where applicable) and value. If applicable, the account shall separately list and identify merchandise withdrawn for

(1) duty-free store exportation,

(2) vessel or aircraft supply use, and

(3) personal or official use of persons and organizations set forth in Subpart I, Part 148, of this chapter. If all of the merchandise was withdrawn under the sales ticket procedure of § 144.37(h) of this chapter, the sales ticket register may be substituted for the blanket permit summary. The form will be placed in the permit file folder and treated as provided in § 19.12(a) of this part.

* * * * * * *

7. It is proposed to amend section 19.11 by revising the first sentence of paragraph (c), removing the fourth sentence of paragraph (d), and revising paragraph (d) and by adding a new paragraph (h), to read as follows:

§ 19.11 Manipulation in bonded warehouses and elsewhere.

* * * * * * *

(c) Warehouse proprietors shall not allow manipulation of any merchandise without a prior permit issued by the district director, except as provided in paragraph (h) of this section. ***

(d) The application to manipulate, which shall be filed on Customs Form 3499 with the district director having jurisdiction of the warehouse or other designated place of manipulation, shall describe the contemplated manipulation in sufficient detail to enable the district director to determine whether the imported merchandise is to be cleaned, sorted, repacked, or otherwise changed in condition, but not manufactured, within the meaning of section 562, Tariff Act of 1930, as amended. If the district director is satisfied that the merchandise is to be so manipulated, he may issue a permit on Customs Form 3499, making any necessary modification in such form. The district director may approve a blanket application to manipulate on Customs Form 3499, for a period of up to one year, for a continuous or a repetitive manipulation. The warehouse proprietor must maintain a running record of manipulations performed under a blanket application, indicating the quantities before and after each manipulation. The record must show what took place at each manipulation describing marks and numbers of packages, location within the facility, quantities, and description of goods before and after manipulation. The district director is authorized to revoke a blanket approval to manipulate and require the proprietor to file individual applications if necessary to protect the revenue, administer any law or regulation, or both. Manipulation resulting in a change in condition of the merchandise, which will make it subject to a lower rate of

duty or free of duty upon withdrawal for consumption, is not precluded by the provisions of such section 562.

* * * * * * *

(h) Merchandise which has been entered for warehouse and placed in a Class 9 warehouse (duty-free store) may be unpacked into saleable units without a prior permit issued by the district director. The district director may issue a blanket permit to a duty-free store for up to one year permitting the destruction of merchandise covered by any entry and found upon receipt to be nonsaleable, if the merchandise to be destroyed is valued at less than $100 per entry, in its undamaged condition. Such a permit may be revoked in favor of a permit for each entry whenever necessary to assure proper destruction and protection of the revenue. The proprietor shall maintain a record of unpacking merchandise into saleable units and destruction of nonsaleable merchandise in its inventory and accounting records.

8. It is proposed to amend section 19.12 by revising paragraph (a)(2), adding two sentences to the end of paragraph (a)(3), by revising paragraph (a)(4), and by adding a new paragraph (a)(8), to read as follows:

§ 19.12 Warehouse recordkeeping, storage and security requirements.

(a) * * *

(2) *Maintain permit file folders.* Permit file folders shall be maintained and kept up to date by filing all receipts, damage or shortage reports, manipulation requests, withdrawals, removals, and blanket permit summaries within two business days after the event occurs.

(3) *Theft, shortage, overage or damage.* * * * The applicable duties and taxes on thefts and shortages so reported shall be paid by the responsible party to Customs within 10 working days after discovery. The district director may allow the consolidation of duties and taxes applicable to multiple shortages into one payment.

(4) *Review of permit file folder.* When the final withdrawal of merchandise relating to a specific warehouse entry, general order or seizure occurs, the warehouse proprietor shall

(i) review the permit file folder to insure that all necessary documentation is in the file folder accounting for the merchandise covered by the entry,

(ii) notify Customs of any merchandise covered by the warehouse entry, general order or seizure which has not been withdrawn or removed, and

(iii) file the permit file folder with Customs within 30 business days after final withdrawal.

* * * * * * *

(8) *Automated operating and inventory control systems.* The district director may authorize the implementation by a proprietor of automated data processing systems for operating and inventory control purposes if they are in support of Customs procedural requirements and do

not adversely affect Customs supervision and control of warehouse activities and transactions.

* * * * * * *

9. It is proposed to amend Part 19, Customs Regulations by adding after section 19.34, a new center heading entitled "Duty-Free Stores" and new sections 19.35, 19.36, 19.37, 19.38, and 19.39, to read as follows:

DUTY-FREE STORES

DUTY-FREE STORES

§ 19.35 Establishment of duty-free stores (Class 9 warehouses).

(a) *General.* A Class 9 warehouse (duty-free store) may be established for exportation of conditionally duty-free merchandise by individuals departing the customs territory, inclusive of foreign trade zones, by aircraft, vessel, or departing directly by vehicle or on foot to a contiguous country. Such articles must accompany the individual on his person or in the same aircraft, vessel, or vehicle in which the individual departs. "Conditionally duty-free merchandise" means merchandise sold by a duty-free store on which duties and/or internal revenue taxes (where applicable) have not been paid. Except insofar as the provisions of this section and § 19.36–19.39 are more specific, the procedures for bonded warehouses apply to duty-free stores (Class 9 warehouses).

(b) *Location.* A Class 9 warehouse may be established or located only (1) within the same port of entry from which a purchaser of duty-free store merchandise departs the customs territory, or (2) within 25 statute miles from the exit point through which the purchaser of duty-free store merchandise departs the customs territory.

(c) *Integrated locations.* A Class § warehouse with multiple noncontiguous sales and crib locations (see § 19.37(a) of this part) containing conditionally duty-free merchandise will be treated by Customs as one location if (1) the proprietor can provide Customs upon demand with the proper on-hand balance of each inventory item in each storage location, sales room, crib, mobile crib, delivery cart, or other conveyance or noncontiguous location, and (2) the recordkeeping system is centralized up to the point where a sale is made so as to automatically reduce the sale quantity by location from the centralized inventory.

(d) *Exit point.* The exit point referred to in paragraph (b) of this section means the area in close proximity to an actual exit for departing from the Customs territory, including the gate holding area in the case of an airport, but only if there is reasonable assurance that conditionally duty-free merchandise delivered in the gate holding area will be exported from the Customs territory. The exit point in the case of a land border or seaport duty-free store is the point at which a departing

individual has no practical alternative to continuing on to a foreign country or to returning to Customs territory without passing through a U.S. Customs inspection facility. The district director's decision as to what constitutes the exit point or reasonable assurance of exportation in a given situation is final.

(e) *Notice to customers.* Class 9 warehouse proprietors shall display in prominent places where they will be noticed and read by customers signs which state clearly that any conditionally duty-free merchandise purchased from the store:

(1) has not been subjected to any U.S. Federal duty or tax;

(2) if brought back to the United States must be declared and is subject to U.S. Federal duty and tax without personal exemption; and

(3) is subject to the Customs laws and regulations, including possible duties and taxes, of any foreign country to which it is taken.

(f) *Security of sales rooms and cribs.* The physical and procedural security requirements of § 19.12(b)(3) of this part shall be applied by the district director so as to accommodate the movement of purchasers and prospective purchasers of conditionally duty-free merchandise contained in duty-free sales rooms and cribs.

(g) *Approval of governmental authority.* If a state or local or other governmental authority, incident to its jurisdiction over any airport, seaport, or other exit point facility, requires that a concession or other form of approval be obtained from that authority with respect to the operation of a duty-free store under which merchandise is delivered to or through such facility for exportation, merchandise incident to such operation may not be withdrawn for exportation and transferred to or through such facility unless the operator of the duty-free store demonstrates to the district director that the concession or approval required for the enterprise has been obtained.

§ 19.36 Requirements for duty-free store operations.

(a) *Withdrawals.* Merchandise withdrawn under the sales ticket procedure in § 4.37(h) of this chapter may be delivered only to individuals departing from the Customs territory for exportation or to persons and organizations for use as specified in Subpart I, Part 148, of this chapter. Withdrawals of other kinds may be made from Class 9 warehouses, but only through separate withdrawals (or withdrawals under blanket permit for vessel or aircraft supplies) under an approved permit of the district director as provided in § 144.39 of this chapter.

(b) *Procedures required.* Each duty-free store shall establish, maintain, and follow written procedures to provide reasonable assurance to the district director that conditionally duty-free merchandise purchased therein will be exported from the Customs territory. A copy of any change in the procedure will be provided to the district director before it is implemented. However, receipt by Customs of the procedures or of any change thereto shall not be construed as approval by Customs of the procedures. The district director is responsible for insuring that each enterprise has established guidelines with Customs and is

complying with those guidelines, giving assurance that proper supervision exists when delivery is made to the purchaser at or before the exit point. The district director may at any time require any change in the procedures deemed necessary for assurance of exportation.

(c) *Personal-use restrictions.* Any duty-free store which delivers conditionally duty-free merchandise to purchasers at an airport exit point shall establish, maintain, and enforce written restrictions on the sale of conditionally duty-free merchandise to any one individual to personal-use quantities. Personal-use quantities means quantities that are only suitable for uses other than resale, and includes reasonable quantities for household or family consumption as well as for gifts to others. Proprietors will not knowingly sell or deliver conditionally duty-free merchandise in any quantity to any individual for the purpose of resale. A copy of the restrictions and of any change thereto shall be provided to the district director prior to implementation. However, receipt of the written restrictions by Customs shall not be construed as approval by Customs of the restrictions. The district director may require any change in the restrictions deemed necessary to conform to the personal-use quantity restriction of this section.

(d) *Reimported merchandise.* Merchandise purchased in a duty-free store is not eligible for exemption from duty, or tax where applicable, under Chapter 98, Subchapter IV, Harmonized Tariff Schedule, if it is brought back to the United States after exportation. To enforce this restriction, the district director may require the proprietor to mark or otherwise place a distinguishing identifier on individual items of merchandise to indicate the items were sold in a U.S. duty-free store, if a pattern is disclosed in which such items are being brought back to the United States without declaration. A pattern of undeclared reimportations means a number of instances over a period of time and not isolated instances of unrelated violations. Any such marking required by the district director will be inconspicuous to the purchaser and will not detract from the value of the merchandise. The marking requirement will be limited to the items or types of merchandise noted in the pattern, and will not be extended to all merchandise of the store unless all or most items are part of the pattern.

(e) *Merchandise eligible for warehousing.* Only conditionally duty-free merchandise may be placed in a bonded storage area of a Class 9 warehouse. However, domestic merchandise and merchandise which was previously entered or withdrawn for consumption, and which are not fungible with conditionally duty-free merchandise, may be brought into the bonded sales or crib area of a Class 9 warehouse for display and sale, and in the case of a crib, for delivery to purchasers. However, such merchandise must be marked "DUTY-PAID" or "U.S. ORIGIN", or with similar markings, as applicable, for easy distinction by Customs officers and purchasers of conditionally duty-free merchandise from other merchandise in the sales or crib area.

(f) *Sale of merchandise.* Conditionally duty-free merchandise for exportation at airport or seaport exit points may be sold and delivered only to purchasers who display valid tickets for departure from the Customs territory, and crewmembers who have been engaged for a flight or voyage departing directly from the Customs territory.

(g) *Inventory procedure.* Duty-free store proprietors shall maintain a current inventory separately for each storage area, crib, and sales area containing conditionally duty-free merchandise by warehouse entry, or by unique identifier where permitted by the district director. The inventory shall be reconcilable with the accounting and inventory records and the permit file folder requirements of § 19.12(a)(1) and (2), of this part. Proprietors are subject also to the recordkeeping requirements of other paragraphs of § 19.12, as well as those of §§ 19.6(d), 19.37(d), 19.39(d) of this part, and 144.37(h)(3) of this chapter.

§ 19.37 Crib operations.

(a) *Crib.* A "crib" means a bonded area, separate from the storage area of a Class 9 warehouse, for the retention of a small supply of articles for delivery to persons departing from the United States. It shall be located beyond the exit point, unless exception has been made under § 19.39(b) of this part. The crib may be a permanent location or a mobile facility which is periodically moved to a location beyond the exit point. The quantity of goods in the crib shall be limited to two weeks' supply. However, the district director may raise or lower the quantity as he deems necessary for the protection of the revenue and proper administration of U.S. laws and regulations, or he may order the return to the storage area of goods remaining unsold.

(b) *Delivery and removal of merchandise.* Conditionally duty-free merchandise shall be delivered to the crib, or removed from the crib for return to the storage area, under the procedures in Subpart D, Part 125, and § 144.34(a), of this chapter, or under a local control system approved by the district director wherein any discrepancy found in the merchandise will be treated as if it occurred in the bonded warehouse. If delivery is made by licensed cartman, cartage vehicles shall be conspicuously marked as provided in § 112.27 of this chapter.

(c) *Delivery vehicles.* Vehicles, including mobile cribs, containing conditionally duty-free merchandise for delivery to or from a crib shall carry a listing of the articles contained therein. The proprietor shall provide, upon request by Customs, a transfer document sufficient to account for each movement of inventory among its locations. The merchandise in the vehicles shall be subject to inspection by Customs.

(d) *Retention of records.* Class 9 warehouse proprietors shall maintain records at the duty-free store of conditionally duty-free merchandise transported beyond the exit point and returned therefrom, and Customs permits far such movements, for not less than 5 years after exportation of the articles. Such records need not be placed in permit file folders but must be filed by date of movement and destination site.

§ 19.38 Supervision of exportation.

(a) *Sales ticket withdrawals.* Conditionally duty-free merchandise withdrawn under the sales ticket procedure for exportation shall be exported only under Customs supervision as provided in this section and § 19.39 of this part. General Customs supervision shall be exercised as provided in §§ 19.4 of this part and 161.1 of this chapter, and may consist of spot checks of exportation transactions, examination of articles being exported, and audits of the proprietor's records.

(b) *Supervision of ATF bonded exports.* Customs officers may conduct general supervision of exportations of cigarettes and cigars from ATF export bonded warehouses (see 27 CFR Part 290) in conjunction with exportation from duty-free stores.

§ 19.39 Delivery to persons for exportation.

(a) *Delivery to land border locations.* (1) *Land border locations.* "Land border location" means an exit point from which individuals depart to a contiguous country by vehicle or on foot by bridge, tunnel, highway, walkway, or by ferry across a boundary lake or river, but not including departure to a contiguous country by air or sea. Deliveries from a duty-free store for exportation from such locations shall be made to the purchaser only beyond the exit point, except as specified in paragraph (a)(2) of this section.

(2) *Delivery at or before exit point.* Delivery of such merchandise may be made at or before the exit point of any location approved by Customs as of August 23, 1988. In such cases, delivery shall be done under the physical supervision of a Customs officer, or in accordance with established guidelines as outlined in § 19.36(b) of this part. The officer, or an authorized representative of the supervising independent party, shall sign the sales ticket certifying exportation and return it to the proprietor for retention in the files. The district director may also require that the warehouse proprietor have the person receiving the article sign the same copy to certify receipt.

(b) *Delivery to seaport locations.* (1) *Seaport location.* "Seaport location" means an exit point from which conditionally duty-free merchandise is delivered to departing individuals for exportation by vessel of more than 5 net tons which is departing directly from the Customs territory to touch and trade in a foreign country. Deliveries for exportation from such locations may be made only beyond the exit point, except as specified in paragraph (b)(2) of this section.

(2) *Delivery at or before exit point.* Delivery of such merchandise may be made at or before the exit point in the case of any locations approved by Customers of August 23, 1988. In such cases, delivery shall be done under the physical supervision of a Customs officer, or in accordance with established guidelines as outlined in § 19.36(b) of this part. The officer, or an authorized official of the supervising independent party, shall sign the sales ticket certifying exportation and return it to the proprietor for retention in the files. The district director may also require

that the warehouse proprietor have the person receiving the article sign the same copy to certify receipt.

(c) *Delivery to airport locations.* "Airport locations" means an exit point from which conditionally duty-free merchandise is delivered to departing individuals for exportation on a scheduled, chartered, or "for hire" airline. Delivery of conditionally duty-free merchandise to be exported from such locations may be made by one of the following five procedures:

(1) *Delivery in sterile area.* A sterile area is an area that is within the airport and to which access is restricted to those passengers departing from Customs territory. In such cases, delivery will be made directly to the purchaser (or a family member or companion travelling with the purchaser) for carrying aboard the aircraft. This method of delivery is not authorized if there is any mixture in the sterile area of individuals arriving from a foreign country, or individuals arriving or departing on a domestic flight, with individuals departing for foreign.

(2) *Passenger delivery.* Merchandise may be delivered by the cartman or duty-free store operator to the purchaser (or a family member or companion travelling with the purchaser) at or beyond the exit point for the flight. The district director may require the exit point to be delimited by marking of its boundaries, or require proper supervision as outlined in the guidelines established in accordance with § 19.36(b) of this part, if needed for reasonable assurance that conditionally duty-free merchandise will be exported with the purchaser or a family member or companion. A certificate of lacing shall be prepared by the proprietor for each shipment of conditionally duty-free merchandise and executed by an authorized airline official, certifying that the merchandise has been laden on a particular aircraft for exportation. After execution, the certificate will be returned to the duty-free store proprietor for filing. The certificate shall include the following information: warehouse entry number (or unique identifier, if permitted by the district director); aircraft departure date; airline flight number, and total quantity delivered to the flight.

(3) *Aircraft delivery.* The merchandise will be delivered by a licensed cartman for lading directly on the aircraft. An authorized representative of the airline will sign for receipt of the merchandise on a lading manifest (see paragraph (c)(4)(iii) of this section). The airline will release the merchandise to the purchaser when the aircraft has departed for its foreign destination, and return the receipt copy to the proprietor .

(4) *Unit-load delivery.* Merchandise may be sold to passengers departing from the United States at a prior port of boarding on flights proceeding to a foreign destination which are required to clear with intermediate stops in the United States, provided that all the following conditions are met:

(i) Sales may be made only to passengers holding a through ticket on the same flight, with no stopover privileges, to a foreign destination;

(ii) Merchandise shall be placed in a container sealed with Customs seals. The sealed container(s) may be placed in the baggage compartment or on the passenger deck of the aircraft. Containers stowed in baggage compartments may, with Customs permission, be transferred to the passenger deck at an intermediate or final stop in the United States. The seal numbers shall be placed on the face of the aircraft general declaration;

(iii) A lading manifest list, in duplicate, of conditionally duty-free merchandise sold to passengers aboard the particular flight will be prepared by the proprietor. An authorized airline representative will sign for receipt, with one copy to be retained by the airline for presentation to Customs as requested at the intermediate or final port, and the duplicate copy to be returned to and retained by the proprietor for record purposes;

(iv) The seals shall not be broken nor shall any of the purchases be delivered until the aircraft is secured for departure to its foreign destination at the last port. In the event that the seals are broken before that time, or the merchandise is not exported for any reason and not returned to Customs custody, demand shall be made against the importation and entry bond of the importer of record.

(5) *Cancelled or aborted flights or "no show" Purchasers.* If the proprietor has made a good faith effort to effect delivery for exportation through one of the methods specified in paragraph (c)(1) through (4) of this section, but is unable to do so for reasons beyond the proprietor's control, the proprietor may deliver the conditionally duty-free merchandise by any other method deemed reasonable by the district director. Written procedures for delivery for exportation, specifying responsibilities for any discrepancies which might occur, shall be established by the proprietor and provided to the district director. The district director may require any change in procedure deemed necessary to assure exportation under specific circumstances.

(6) *Sales to crewmembers.* The sale or delivery of conditionally duty-free merchandise to crewmembers is allowed only on flights proceeding directly to a foreign destination with no intermediate stops in the United States.

(d) *Lading manifest lists; certificate of exportation.*

The proprietor shall retain copies of lading manifest lists and certificates of lading for exportation in its files at the duty-free store for not less than 5 years after exportation.

(e) *Delivery method.* Delivery of conditionally duty-free merchandise to persons for exportation will be made by licensed cartmen under the procedures in Subpart D Part 125, and § 144.34(a), of this chapter, or under a local control system approved by the district director wherein any discrepancy found in the merchandise will be treated as if it occurred in the bonded warehouse.

(f) *Return of merchandise to stock.* Whenever merchandise is withdrawn under the sales ticket procedure of § 144.37(h) of this chapter,

but is undeliverable or is rejected by the purchaser, the merchandise may be returned to the duty-free store and the records, including the sales ticket and sales ticket register, amended to reflect the quantity returned to stock. Written procedures for the return of merchandise to stock, specifying responsibilities for any discrepancies which might occur, shall be established by the proprietor and provided to the district director. The district director may require any change in procedure deemed necessary to assure that the merchandise is not diverted into commerce.

PART 113—BONDS

1. The authority citation for Part 113 would continue to read as follows:

Authority: 19 U.S.C. 66, 1623, 1624. Subpart E also issued under 19 U.S.C. 1484, 1551, 1565.

2. It is proposed to amend section 113.63 by adding a new paragraph (c)(5) thereto as follows:

§ 113.63 Basic custodial bond conditions.

* * * * * * *

(c) *Disposition of merchandise.* * * *

(5) In the case of Class 9 warehouses, the proprietor will provide reasonable assurance of exportation of merchandise withdrawn under the sales ticket procedure of § 144.37(h) of this chapter.

* * * * * * *

PART 144—WAREHOUSE AND REWAREHOUSE ENTRIES AND WITHDRAWALS

1. The authority citation for Part 144 would be revised to read as follows:

Authority: 19 U.S.C. 66, 1484, 1557, 1559, 1624.
Section 144.3 also issued under 19 U.S.C. 1563;
Section 144.33 also issued under 19 U.S.C. 1562;
Section 144.37 also issued under 19 U.S.C. 1555, 1562.

2. It is proposed to amend section 144.37 by adding a new paragraph (h) to read as follows:

§ 144.37 Withdrawal for exportation.

* * * * * * *

(h) *Class 9 warehouse withdrawals for exportation.*

(1) *Applicability of sales ticket procedure.* Merchandise in a Class 9 warehouse (duty-free store) may be withdrawn for any of the purposes set forth in this subpart. However, only conditionally duty-free merchandise in a Class 9 warehouse intended for exportation or for delivery to persons and organizations as set forth in Subpart I, Part 148, of this chapter, will be eligible for withdrawal under the sales ticket procedure specified in this paragraph.

(2) *Sales ticket content and handling.* Sales ticket withdrawals shall be made only under a blanket permit to withdraw (see § 19.6(d) of this chapter) and the sales ticket shall serve as the equivalent of the supplementary withdrawal. A sales ticket is an invoice of the proprietor's design which will include:

(i) Serial number and date of preparation of each ticket;

(ii) Warehouse entry number or specific identifier, if approved by the district director;

(iii) Quantity of goods sold;

(iv) Brief description of the articles including the size of bottles;

(v) The full name, address and signature of the purchaser. However, the district director may waive the address and signature requirement (but not the name requirement) for alcoholic beverages in quantities of 4 liters or less and cigarettes in quantities of 3 cartons or less; and

(vi) A statement on the original copy (purchaser's copy) to the effect that goods purchased in a duty-free store will be subject to duty and/or tax without personal exemption if returned to the United States. At the time of purchase, the sales ticket, in triplicate, shall be made out in the name of the purchaser. One copy shall be retained by the proprietor. A permit file copy will be attached to the parcel containing the articles, and the original given to the purchaser. Additional copies may be retained by the proprietor.

(3) *Sales ticket register.* In addition to the records required in § 19.12(a) of this chapter, Class 9 warehouse proprietors shall maintain a sales ticket register or similar accounting record for each warehouse entry. This sales ticket register of the proprietor shall include the following information:

(i) warehouse entry number;

(ii) specific identifier, if applicable;

(iii) sales ticket date and number;

(iv) description;

(v) quantity; and

(vi) current balance.

As each warehouse entry is closed out, the warehouse proprietor shall verify the sales ticket register total with the amount withdrawn so as to account for all merchandise so withdrawn and certify on the register that all the goods have been exported or sold to qualifying persons and organizations under Part 148 of this chapter. The sales ticket register shall be included in the permit file folder with or in lieu of the blanket permit summary, as provided in § 19.6(d) (4) of this chapter. A copy of all sales tickets shall be retained by the proprietor for not less than 5 years after the last date of the last sales ticket in the entry. In lieu of placing a copy of sales tickets in each permit file folder, the warehouse proprietor

may keep all sales tickets in a separate file in numerical sequence by warehouse entry number.

CAROL HALLETT,
Commissioner of Customs.

Approved: May 9, 1991.
PETER K. NUNEZ,
Assistant Secretary of the Treasury.

[Published in the Federal Register, May 17, 1991 (56 FR 22833)]

19 CFR Part 101

PROPOSED CUSTOMS REGULATIONS AMENDMENT TO RELOCATE THE NORTH CAROLINA CUSTOMS DISTRICT HEADQUARTERS AT CHARLOTTE

AGENCY: U.S. Customs Service.

ACTION: Proposed rule.

SUMMARY: This document proposes to change the field organization of the Customs Service by relocating the North Carolina Customs District headquarters from Wilmington, North Carolina, to Charlotte, North Carolina. This proposed relocation is prompted by the dramatic shift in the volume of Customs activity which has occurred within this district in recent years. Customs operational services in Wilmington, which would remain a Customs port of entry, would not be impaired, should the proposed relocation become effective. The proposed change is part of Customs continuing program to obtain more efficient use of its personnel, facilities and resources, and to provide better overall service to carriers, importers, and the general public.

DATE: Comments must be received on or before July 15, 1991.

ADDRESS: Comments (preferably in triplicate) should be submitted to and may be inspected at the Regulations and Disclosure Law Branch, U.S. Customs Service, 1301 Constitution Avenue, NW., Room 2119, Washington, DC 20229.

FOR FURTHER INFORMATION CONTACT: Jackie Motley, Office of Inspection and Control, (202-566-8157).

SUPPLEMENTARY INFORMATION:

BACKGROUND

As part of a continuing program to obtain more efficient use of its personnel, facilities, and resources, and to provide better service to carriers, importers, and the public, Customs proposes to relocate the North

Carolina Customs District headquarters from Wilmington to Charlotte, North Carolina. The proposed relocation is based on the fact that there has been a dramatic shift in the volume of Customs activity within North Carolina in recent years.

Specifically, over the past five years, Charlotte has experienced very significant commercial growth which, in turn, has stimulated large increases in Customs activities there. For example, since 1985, the number of Customs entries in Charlotte has increased from over 13,000 to below 11,000. Duty collections in 1989 in Charlotte amounted to over $70 million, while duty collections in Wilmington amounted to $51 million. All Customs projections in various activity categories (including duty collection) strongly point to a continuation of increased Customs volume in Charlotte.

Given this workload growth, Customs believes that relocation of the North Carolina Customs District headquarters to Charlotte, North Carolina, will result in more economical and efficient use of its personnel and resources in carrying out the Customs mission.

The planned relocation, however, if implemented, will affect only district management and support personnel. Wilmington, North Carolina, will remain a Customs port of entry, with existing levels and hours of commercial operations continuing to meet the needs of the Wilmington trade community. In this connection, Customs operational services in Wilmington would not be impaired, should the proposed relocation become effective.

The Secretary of the Treasury is advised by the Commissioner of Customs in matters affecting the field organization of the Customs Service. The change currently under consideration is proposed under the authority vested in the President by § 1 of the Act of August 1, 1914, 38 Stat. 623, as amended (19 U.S.C. 2), and delegated to the Secretary of the Treasury by Executive Order No. 10289, September 17, 1951 (3 CFR 1949–1953 Comp., Ch. II), and pursuant to authority provided by Treasury Department order No. 101-5, dated February 17, 1987 (52 FR 6282).

Comments

Before adopting this proposal, consideration will be given to any written comments timely submitted to the Customs Service. Comments submitted will be available for public inspection in accordance with the Freedom of Information Act (5 U.S.C. 552), § 1.4, Treasury Department Regulations (31 CFR 1.4), and § 103.11(b), Customs Regulations (19 CFR 103.11(b)), on regular business days between the hours of 9:00 a.m and 4:30 p.m., at the Regulations and Disclosure Law Branch, Room 2119, Headquarters, U.S. Customs Service, 1301 Constitution Avenue, N.W., Washington, D.C.

Executive Order 12291 and Regulatory Flexibility Act

Because this document is related to agency organization and management, it is not subject to E.O. 12291. Also, for the same reason, although Customs is soliciting public comments, no notice of proposed

rulemaking is required under 5 U.S.C. 553 (a)(2). Accordingly, this document is not subject to the Regulatory Flexibility Act (5 U.S.C. 601 et seq.).

Drafting Information

The principal author of this document was Russell Berger, Regulations and Disclosure Law Branch, U.S. Customs Service. However, personnel from other offices participated in its development.

List of Subjects in Part 101

Customs duties and inspection, Exports, Imports, Organization and functions (Government agencies).

Proposed Amendment

It is proposed to amend Part 101, Customs Regulation (19 CFR Part 101), as set forth below.

PART 101—GENERAL PROVISIONS

1. The authority citation for Part 101 would continue to read as follows:

Authority: 5 U.S.C. 301; 19 U.S.C. 2, 66, 1202 (General Note 8, Harmonized Tariff Schedules of the United States), 1623, 1624.

2. It is proposed to amend the list of Customs regions, districts and ports of entry in § 101.3(b) by removing "Wilmington, N.C.", directly below "Norfolk, Va." under the column titled "Name and headquarters", and inserting in its place, "Charlotte, N.C.", and by repositioning "Charlotte (T.D. 56079)", at the head of the column titled "Ports of entry", in the Charlotte, North Carolina, District, and, in appropriate alphabetical order thereunder, "Wilmington, including townships of Northwest, Wilmington, and Cape Fear (E.O. 7761, Dec. 3, 1937, 2 FR 2679, and territory described in E.O. 10042, Mar. 10, 1949, 14 FR 1155)".

Carol Hallett,
Commissioner of Customs.

Approved: March 29, 1991.
John P. Simpson,
Acting Assistant Secretary of the Treasury.

[Published in the Federal Register May 15, 1991 (56 FR 22369)]

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

Chief Judge

Judges

Gregory W. Carman*
Jane A. Restani
Dominick L. DiCarlo
Thomas J. Aquilino, Jr.
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R. Kenton Musgrave
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Samuel M. Rosenstein

Nils A. Boe

Clerk

Joseph E. Lombardi

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* Acting as Chief Judge, effective May 1, 1991, pursuant to 28 U.S.C. § 253d.

Decisions of the United States Court of International Trade

(Slip Op. 91-36)

ARTHUR J. HUMPHREYS, INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 82-09-01254

[Judgment in part for the plaintiff.]

(Decided May 3, 1991)

Law offices of George R. Tuttle (Stephen S. Spraitzar) for plaintiff.
Stuart M. Gerson, Assistant Attorney General, *Joseph I. Liebman,* Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, United States Department of Justice *(Saul Davis)* for defendant.

DICARLO, *Judge:* Plaintiff challenges the classification of several styles of vegetable fiber panels manufactured and designed to be used as decorative wall and ceiling covering. Customs classified the merchandise as hardboard under item 245.30, Tariff Schedules of the United States (TSUS). Plaintiff asserts the merchandise is properly classifiable as building board under item 245.90, TSUS. In the event the Court finds Customs' classification to be incorrect, Customs offers an alternative classification as laminated building board under item 245.80, TSUS. The Court finds plaintiff has overcome the presumption of correctness in Customs' classification and will remand this action to Customs if the government wishes to pursue its alternative classification.

BACKGROUND

The merchandise consists of various styles of rigid panels six millimeters thick; 10 are four feet by eight feet and one is four feet by four feet. The rectangular panels are designed and manufactured for use as wall paneling. The square panel is designed and manufactured for use as ceiling tile.

Some of the wall panels are designed to simulate the appearance of various wooden surfaces. The "Buckingham" style, for example, is designed to simulate formal inlaid woodwork typical of an English library. The "Colonial Pine" style simulates molded knotty pine paneling. All of the wood grain patterns have interior grooving which is either embossed or machined onto the panel during the manufacturing process. These panels have grooves at varying distances with at least one every 16 inches. In addition to creating a decorative pattern, the grooves have the ancillary function of hiding nails used to secure the panels to studs in the wall.

Other styles simulate non-wood surfaces. "Manor House," for example, is embossed with a brick pattern. "Hacienda" has the look of lightly troweled stucco. The ceiling panel is similar to "Hacienda" except that it has interior grooving to give the appearance of 12 inch square tiles.

Several styles of the merchandise have functional edgework. The edgework ensures proper installation to produce the desired pattern. The remaining styles have straight edges because the order in which the panels are installed does not affect the pattern.

Customs classified the merchandise under item 245.30, TSUS, covering various types of hardboard, whether or not face finished. Plaintiff claims the proper classification is under item 245.90, TSUS: "[b]uilding boards, not specially provided for, whether or not face finished: other boards, of vegetable fibers (including wood fibers) * * * ." The government proposes, as an alternative classification, item 245.80, TSUS: "[b]uilding boards, not specially provided for, whether or not face finished: [l]aminated boards bonded in whole or in part, or impregnated, with synthetic resins * * * ."

At the trial, the parties entered into stipulations of fact and the Court made findings of facts on the record. One of the findings the Court made is that 90% of the merchandise is used as wall or ceiling covering. The remaining 10% is used primarily in the construction of furniture and retail displays.

Discussion

The meaning of a tariff term is a question of law. *Digital Equip. Corp. v. United States,* 889 F.2d 267, 268 (Fed. Cir. 1989). Whether a particular article fits within the meaning of a tariff term is a question of fact. *Brookside Veneers, Ltd. v. United States,* 6 Fed. Cir. (T) 121, 124, 847 F.2d 786, 788, *cert. denied,* 488 U.S. 943 (1988).

The TSUS provision for hardboard is an *eo nomine* provision. In the absence of limitations or a contrary legislative intent, an *eo nomine* provision includes all forms of the product. *C. T. Takahashi & Co. v. United States,* 74 Cust. Ct., 38, 46, C.D. 4583 (1975); *see also Tomoegawa USA, Inc. v. United States,* 12 CIT 112, 116, 681 F. Supp. 867, 870, *aff'd in part, vacated and remanded in part,* 861 F.2d 1275 (Fed. Cir. 1988). An improvement in merchandise provided for *eo nomine* does not remove it from classification under the *eo nomine* designation. *Takahashi,* 74 Cust. Ct. at 46. Nevertheless, if the merchandise is advanced so as to become the article for which the material was intended, it may fall outside the *eo nomine* classification. *See. e.g., A. N. Deringer, Inc. v. United States,* 61 Cust. Ct. 66, 72, C.D. 3530, 287 F. Supp. 1016, 1021 (1968)(wooden wedges used in construction not sufficiently advanced to be classified as a manufacture of wood rather than as lumber).

Plaintiff maintains its merchandise is a form of processed hardboard that has become the article for which the material was intended; in this case, building board. The government counters that since plaintiff's merchandise has commercially significant uses beyond those for building board, it has not ceased to be classifiable as hardboard. Further-

more, the government warns that accepting plaintiff's argument would so enlarge the scope of the TSUS provision for building boards that provisions for similar merchandise will become superfluous.

This Court has previously considered the three TSUS items at issue. *See American Hardboard Assoc. v. United States,* 12 CIT 714 (1988). In *American Hardboard,* Customs initially classified prefinished lap siding with a plastic locking spline attached to the back as building board under TSUS item 245.90. After a remand, the merchandise was reclassified as laminated building board under item 245.80, TSUS. Plaintiff claimed the proper classification was as hardboard under item 245.30, TSUS. *Id.* at 714.

I. Hardboard

A. Fungibility and the *American Hardboard* Standard:

In *American Hardboard,* the court considered the legislative history as embodied in the *Tariff Classification Study* to determine the meaning of the term hardboard. According to the study:

> Hardboard is used chiefly in construction, in cabinet and millwork, in furniture and fixtures, and other fabricated and industrial products, in transportation equipment, for display purposes, in games, toys, and sporting products; also a high-density type of hardboard is used for dies in spinning and forming light-gauge metals, for jigs and templates, and for structural electrical-insulation materials. 4 *Tariff Classification Study* 67.

The court concluded

> that the hardboard designated *eo nomine* is a basic, fungible material capable of being used for a variety of functions * * *. This legislative history indicated that at some point the material designated as hardboards and provided for *eo nomine* under 245.30, TSUS, may no longer be within that classification because it has been advanced beyond a basic, fungible material and has become a new and different article of commerce.

Id. at 716. The court found the merchandise was "suitable *only* for use as interlocking siding in construction * * *." and was, therefore, "advanced beyond the basic, fungible material known as hardboard * * *." *Id.* at 717 (emphasis added).

The Court notes that by using the expression "basic, fungible material" in *American Hardboard,* it did not intend to imply that hardboard classifiable under TSUS item 245.30 must be interchangeable or substitutable with hardboard from another manufacturer in the sense that sand or wheat may be a fungible commodity. Rather, the court meant only that hardboard is an input material commercially susceptible to a variety of uses.

Based on the result in *American Hardboard,* the government maintains that since plaintiff's merchandise is suitable for more than a single use, it is necessarily an input material rather than a manufactured article. Although the *American Hardboard* court found the plastic spline

permanently attached to the siding made it "suitable only for use as interlocking siding in construction," this factual finding was addressed to the merchandise at issue and did not state a general proposition of law. Rather, whether merchandise is classifiable as hardboard under item 245.30, TSUS, depends on the factual advancements unique to the merchandise. *American Hardboard,* 12 CIT at 717.

Here, the Court has found that 90% of plaintiff's merchandise is put to its intended use as wall or ceiling covering. The question is whether the use of the remaining 10% is sufficient to make the merchandise an input material rather than a manufactured article.

B. Dedication to Particular Use:

Plaintiff relies on a series of cases involving marble slabs and articles fashioned from marble for the proposition that 90% dedication to a particular use is sufficient to make merchandise a manufactured article. In *United States v. Quality Marble & Granite Co.,* 48 CCPA 50, C.A.D. 763 (1960), the merchandise consisted of "square, rectangular, and round pieces of marble of three-quarters and five-eighths of an inch in thickness." The marble was polished on one side and the top edges were slightly rounded. The rectangular pieces had many uses. Ninety percent of the round pieces, however, were used as table tops. All of the merchandise was used in its imported condition. *Id.* at 51.

The government contended the merchandise was properly classifiable as wholly or partly manufactured articles. The importer claimed the correct classification was as the input material marble slabs. The Court of Appeals found that to use the marble in any way other than in the condition in which it was imported "would nullify part of the work which had already been done on [it]." Id. at 53. The court held the merchandise was classifiable as wholly or partly manufactured articles even though it was susceptible to other uses. *See also A.P. Baldechi & Son v. United States,* 56 CCPA 112, C.A.D. 963, 420 F.2d 756 (1969) (following *Quality Marble*).

In *United States v. Selectile Co.,* 49 CCPA 116, C.A.D. 805 (1962), the court faced essentially the identical issue. In this case, however, the merchandise was "often * * * cut to the correct dimensions for the particular installation, either in length or width, or in both dimensions * * *. None of the larger pieces was used in the condition as imported." *Id.* at 118 (quoting opinion of the Customs Court). The court held "the imported merchandise is nothing more than material which appellees stock in sizes most adaptable to their marble installation business. Under these circumstances, * * * the merchandise cannot be considered 'articles' * * *." *Id.* at 119-20. The court distinguished *Quality Marble* on the fact that 90% of the merchandise in that case was used in its imported condition. *Id.* at 120.

In its brief, the government has made no attempt to distinguish these cases. Nevertheless, the government argues that following *Quality Marble* would produce results contrary to Congressional intent.

Plaintiff also relies on *Permagrain Prods., Inc. v. United States,* 9 CIT 426, 623 F. Supp. 1246 (1985), *aff'd,* 4 Fed. Cir. (T) 87, 791 F.2d 914 (1986), where the merchandise was wood parquet flooring tiles. Customs classified the merchandise as "other wood flooring" and the plaintiff maintained it was properly classifiable as "hardwood lumber, rough, dressed or worked." Testimony at trial established that a *de minimis* percentage of the merchandise was put to a use other than as flooring. *Id.* at 437, 623 F. Supp. at 1255.

The court stated that "if the lumber has been processed to the extent that *it itself* became the article for which the material was intended, then it is dutiable as a manufacture of wood and not as lumber." Id. at 435, 623 F. Supp. at 1253 (quoting *A. N. Deringer, Inc. v. United States,* 61 Cust. Ct. 66, 72, C.D. 3530, 287 F. Supp. 1016, 1021 (1968)) (emphasis in original). The court held the merchandise had been advanced to the degree that it ceased to be lumber and was classifiable as flooring. *Id.* at 435-36, 623 F. Supp. at 1254.

These cases make it clear that merchandise may fall within a classification for manufactured articles even though as much as 10% of it is put to uses inconsistent with that classification. Consequently, the fact that 10% of the panels at issue are put to alternative uses is not dispositive.

The government relies upon *C. T. Takahashi & Co. v. United States,* 74 Cust. Ct. 38, C.D. 4583 (1975) as authority for its argument that the wall panels and ceiling tile are an input material classifiable as hardboard. *See* Defendant's Brief at 38-43. *Takahashi* considered the classification of plywood wall panels that had been decorated with face grooving and edgework. The paneling was known to the trade and advertised as plywood. Plaintiff maintained the proper classification was "manufactures of wood" rather than "plywood." The court held the grooved plywood paneling had not been subjected to a manufacturing process that caused it to lose its identity as plywood. Id. at 49.

The *Takahashi* decision emphasized that each case stands upon its own particular facts and that whether merchandise is an article rather than an input material depends upon the nature of the material involved and the degree of processing to which it was subjected. *Id.* at 48 (quoting *B.A. McKenzie & Co., Inc., et al. v. United States,* 47 CCPA 42, 46, C.A.D. 726 (1959)). The manufacturing at issue in *Takahashi* was V-grooving. *Id.* at 49. Here, plaintiff's panels are subjected to more elaborate processing which may include machining or embossing with a stylized textured surface, printing with durable inks, face grooving and edgeworking. The resulting product is far removed from "standard hardboard" as exemplified by Plaintiff's Exhibit 14B. Plaintiff's merchandise has the look and feel of products as diverse as brick (Plaintiff's Exhibit 16C), roughly dressed wood (Plaintiff's Exhibit 8A) and stone (Plaintiff's Exhibit 3A). *Takahashi* is, therefore, factually distinguishable.

Takahashi is also distinguishable because it concerned an *eo nomine* provision for plywood that was without limitation. As a result, any form

of plywood would be classifiable under that provision. *Id.* at 46. As the government has argued, under *American Hardboard,* TSUS item 245.30 is not an unlimited *eo nomine* provision but is limited to material commercially susceptible to multiple uses. A form of hardboard that does not have multiple uses is excluded from classification under that item. In this context, the threshold for a commercially significant multiple uses appears to be something more than 10% alternative use.

Having considered Customs' classification both independently and in relation to the plaintiff's proposed classification and the government's alternative classification, *see Jarvis Clark Co. v. United States,* 2 Fed. Cir. (T) 70, 75, 733 F.2d 873, 878, *reh'g denied,* 2 Fed. Cir. (T) 97, 739 F.2d 628 (1984), the Court finds plaintiff has overcome the presumption of correctness attaching to Customs' classification. *See* 28 U.S.C. § 263(a)(1) (1988). The imported merchandise has been advanced beyond hardboard; a new and different product has been produced. While 10% of this merchandise is put to a use other than wall or ceiling panelling, that amount is not sufficient to make it a material with a variety of uses. *See United States v. Quality Marble & Granite Co.,* 48 CCPA 50, C.A.D. 763 (1960).

The government raises several objections to this conclusion. First, it contends the variety of uses for the merchandise demonstrates it is merely one form of hardboard. The Court has already found those other uses to be insufficient to make this merchandise classifiable as an input material.

Second, the government asserts this Court's conclusion will conflict with Congressional intent by "eviscerating" many provisions in Schedule 2, Part 3, TSUS. This argument is based on the mistaken assumption that the Court's holding allows articles with divergent uses to be classified as manufactured articles. The Court's holding is based on the controlling authority of the Court of Appeals and is limited to the merchandise at issue in this action. The Court expresses no opinion whether the result would have differed if less than 90% of the merchandise sold was used as wall panels or ceiling tile.

Further, the Tariff Schedules indicate that building boards of plywood or gypsum would not fall within the provision for building board. Plywood is specifically defined in headnote 1(b), Part 3, Schedule 2, TSUS. Building board made of plywood is, therefore, both more specifically described and specially provided for under the provisions for plywood. Similarly, building boards of gypsum or plaster are also more specifically described and specially provided for under the provisions for gypsum and plaster board. The Court's holding, therefore, does not unduly expand the scope of the building board provision.

Finally, the government's reliance on industrial hardboard standards is misplaced. Industrial or commercial standards are useful in ascertaining the commercial meaning of a tariff term. *See Toyota Motor Sales v. United States,* 7 CIT 178, 182-83, 585 F. Supp. 649, 653-54 (1984), *aff'd,* 3 Fed. Cir. (T) 93, 753 F.2d 1061 (1985). In this case, however, the

TSUS provision predates the commercial standard. The standard, therefore, does not reflect the congressional understanding of the term "hardboard" at the time the TSUS provision was enacted.

II. Building Boards

Plaintiff claims the proper classification of its merchandise is under item 245.90, TSUS, covering building boards, whether or not face finished, of vegetable fibers. Building boards are defined in the TSUS as "[p]anels of rigid construction, including tiles and insulation board, chiefly used in the construction of walls, ceilings, or other parts of buildings." Headnote 1(e), Part 3, Schedule 2, TSUS; *American Hardboard,* 12 CIT at 717. There appears to be no dispute as that plaintiff's merchandise is panels of rigid construction chiefly used in the construction of walls, ceilings, or other parts of buildings.

III. Laminated Building Boards

The government's proposed alternative classification is as laminated building boards under item 245.80, TSUS. The government, however, has not briefed this issue and, in the event the Court finds the merchandise is not hardboard, seeks additional time for discovery and briefing. Plaintiff opposes this request asserting the government should have pursued this issue in a more timely manner.

The government contends it sought no discovery on the lamination issue because it was satisfied with deposition testimony from plaintiff's witness. The government now claims the witness "dramatically changed" his testimony at trial. Accordingly, the government seeks further proceedings on this issue.

At trial, the parties were advised that the Court might refer the case to Customs if it became necessary to reach the lamination issue.

Conclusion

While it is clear that the merchandise has a variety of commercial applications, the Court finds the merchandise has been sufficiently advanced that it is no longer an input material commercially susceptible to multiple uses classifiable as hardboard under item 245.30, TSUS. Consequently, the issue of lamination must be decided. Customs is ordered to advise the Court within 30 days whether it wishes to pursue its alternative classification under TSUS item 245.80. If it so advises the Court, the action will be remanded for appropriate administrative action. If the Court is not so advised, judgment will be entered in favor of plaintiff.

(Slip Op. 91-37)

NORCAL/CROSETTI FOODS, INC., PATTERSON FROZEN FOODS, INC. AND RICHARD A. SHAW, INC., EACH CALIFORNIA CORPORATIONS, PLAINTIFFS *v.* U.S. CUSTOMS SERVICE, U.S. DEPARTMENT OF THE TREASURY, HONORABLE NICHOLAS BRADY, SECRETARY OF THE TREASURY, JOHN DURANT, DIRECTOR OF THE COMMERCIAL RULINGS DIVISION, U.S. CUSTOMS SERVICE, AND HARVEY B. FOX, DIRECTOR OF THE OFFICE OF REGULATIONS AND RULINGS OF THE U.S. CUSTOMS SERVICE, DEFENDANTS, COVEMEX, S.A. DE C.V., MAR BRAN, S. DE R.L., EXPOHORT, S.A. DE C.V., VEGATALES CONGELADOS, S. DE P.R., AND CONGELADOS DON JOSE, S.A. DE C.V., APPLICANTS FOR INTERVENTION

Court No. 89-09-00495

Applicants seek to intervene for purposes of appealing this Court's judgment in Slip Op. 91-12.

Held: Applicant's motion is untimely as Slip Op. 91-12 was an interlocutory order remanding the case to Customs for further proceedings.

[Applicant's motion is denied.]

MEMORANDUM OPINION AND ORDER

(Dated May 8, 1991)

Titchell, Maltzman, Mark, Bass, Ohlemeyer & Mishel (Richard D. Maltzman, Robert Ted Parker), for plaintiffs.

Stuart M. Gerson, Assistant Attorney General; *Joseph I. Liebman,* Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, U.S. Department of Justice *(Susan Burnett Mansfield)* for defendants.

Brownstein, Zeidman, and Schomer (Irwin Altschuler, Donald S. Stein), for applicants for intervention.

I. INTRODUCTION

MUSGRAVE, *Judge:* This case was originally decided on the merits on February 27, 1991. Slip Op. 91-12. The Court found that marking country of origin on the rear panel of frozen vegetable packages is not conspicuous, and remanded the case to Customs for issuance of a new Ruling Letter in accordance with that opinion. *Id.*

Covemex, S.A. de C.V., Mar Bran, S. de R.L., Expohort, S.A. de C.V., Vegetales Congelados, S. de P.R., and Congelados Don Jose, S.A. de C.V., (collectively, "Applicants") move for leave to intervene as of right for the sole purpose of appealing the February 27, 1991 order. Applicants concede that they were aware of the filing of the instant action in September, 1989. Although they were aware of the possible adverse effect adjudication would have on their interests, they waited a full year to file their first motion to intervene. *Cf. Howard v. McLucas,* 782 F.2d 956 (11 Cir. 1986) (one factor determining whether to allow intervention is the length of time the would-be intervenor knew or reasonably should have known of his interest in the case before he petitioned to intervene); 26 Fed. Pro. L. Ed. 275-76, § 59:378. That motion was denied on October 15, 1990 as untimely and potentially prejudicial to the parties

of interest.[1] Applicants, chose not to appeal the denial of their motion to intervene but instead accepted the Court's invitation to participate as *amici curiae*. By trying to intervene now Applicants cannot now remedy their earlier failure to appeal the denial of their motion to intervene. The new motion to intervene, after judgment, is untimely.

DISCUSSION

The motion is improper for several reasons outlined below. First, the motion fails because Applicants would appeal an interlocutory judgment of this Court, and not a final judgment. Second, the application is untimely because intervention would unduly prejudice the parties to the case, and Applicants' alleged harm is too nebulous and tenuous to outweigh this prejudice. Third, Applicants have not convinced the Court that their interests will not be adequately represented by the government. Fourth, Applicants have not alleged any independent basis for jurisdiction before this Court. Applicants' alternative motion for permissive intervention is also denied, for the same reasons.

The judgment which they object to is an interlocutory remand to the Commissioner of Customs for certain actions in accordance with the relevant statute. The Court's order accompanying Slip Op. 91-12 is not a final order. It simply remands the case to the Commissioner of Customs for issuance of a new ruling letter in accordance with that decision. Therefore, the timeliness of the motion to intervene, admittedly solely for the purpose of appealing that order, is questionable. As pointed out in *Cabot Corp. v. United States,* 788 F.2d 1539 (Fed. Cir. 1986), 28 U.S.C. § 1295(a)(5) restricts appeals to "final decisions" of this Court. *Id.,* at 1542. "As a general rule an order is final only when it 'ends the litigation on the merits and leaves nothing for the court to do but execute judgment.'" *Cabot,* 788 F.2d at 1542, *quoting, Firestone Tire & Rubber Co. v. Risjord,* 449 U.S. 368, 373, 101 S.Ct. 669, 673, 66 L.Ed.2d 571 (1981). *Cabot* specifically points out that an order remanding a matter to an administrative agency for further proceedings is not final. *Id.,* 788 F.2d at 1542.

Applicants cite *Wolpe v. Poretsky,* 144 F.2d 505 (D.C. Cir. 1944) for the proposition that interested individuals may intervene to appeal a judgment. However, as *Wolpe* points out, intervention is proper "after a *final decree* where it is necessary to preserve some right which cannot otherwise be protected." *Wolpe v. Poretsky,* 144, F.2d at 508 (fn. omitted, emphasis added). Since the Court's order was not a final decree, it is not appealable and intervention is untimely. For the same reason, Applicants' citation to *United Airlines v. McDonald,* 97 S. Ct. 2464, 432 U.S. 385 (1977) is inapposite, as that case discussed intervention for appeal of a final order denying class certification.

[1] Slip Op. 90-106. Under the controlling case law, this was an appealable final order. *See, Sumitomo Metal Industries, Ltd. v. Babcock & Wilcox Co.,* 669 F.2d 703, 706, n.8 (Fed. Cir. 1982) and cases cited therein.

Applicants correctly cite *Sumitomo Metal Industries, Ltd. v. Babcock & Wilcox,* 669 F.2d 703 (C.C.P.A. 1982) as the controlling case on intervention. Judge (now Chief Judge) Nies held that Sumitomo was properly denied intervention of right considering the prejudice to existing parties if they were allowed to intervene and considering the 16 month period during which movant decided not to intervene. There, as here, Sumitomo was not allowed to intervene before judgment by the CIT. When Sumitomo moved to intervene after judgment, its motion was again held untimely and this Court held that Sumitomo waived any right it would otherwise have had to intervene by participating in the capacity of *amicus curiae.* The *Sumitomo* case is directly on point, and this Court will follow it.

Applicants recognize that appeal cannot be taken from an interlocutory order, in discussing the *Sumitomo* case: "It is important to note that [Sumitomo] was seeking intervention for the purpose of appealing an interlocutory order. Consequently, the proceedings before the CIT were not final." Applicants' Memorandum in Support of Motion to Intervene (Memorandum), at 12. However, Applicants fail to recognize the interlocutory nature of this Court's ruling in the instant case.

Applicants have not sufficiently shown that their interests will be prejudiced if they are not allowed to intervene. They allege that the government may or may not appeal, and that if the government does appeal, it might appeal only the jurisdictional but not the substantive aspects of the case.[2] "Even should [the government] ultimately decide to appeal the substantive aspects of the Court's decision, * * * Applicants do not believe that their interests will be adequately represented at this stage of the proceeding." Memorandum, at 4. If not allowed to appeal the substantive aspects of the Court's decision, Applicants allege that they "will be required to redesign their current packages, at considerable expense." Memorandum, at 16.

Therefore, the greatest harm they allege is that they may have to redesign their packaging. While this may or may not be true,[3] the Court notes that the United States Department of Agriculture is promulgating regulations which will require the redesign of the packaging, and there is nothing to indicate any harsh result from requiring compliance with the relevant statute, *i.e.,* placing the name of the country of origin on the front panel of the packaging in conspicuous lettering as required by law. In any event, the new guidelines are as yet unknown, and it is speculative to assess damages from an event which has not yet occurred. Although Applicants may have an interest in the litigation, the possible prejudice to that interest does not outweigh the substantial prejudice to plaintiffs if Applicants are allowed to intervene. *See, e.g., Usery v. Brandel,* 87 F.R.D. 670 (1980) (strong prejudice to existing parties by

[2] The Court notes that the government filed a notice of appeal of Slip Op. 91-12 on April 25,1991.

[3] Packages might be allowed to be used until new designs were available, or they could be "stickered", although cf. *National Juice Products Assoc. v. United States,* 10 C.I.T. 48, 628 F. Supp. 978 (1986) (discusses damages arising from relabeling packaging and difficulty relabeling frozen packages).

allowing intervention after judgment is entered); *see also* reasons given in Slip Op. 90-106, at 4-6.

Applicants' barely concealed desire to suppress the designation of the country of origin cannot be said to be an adequate basis for establishing an "injury". The allegation by Applicants that the "Court's decision notes the alleged loss of market share by plaintiff to imports, and expects that this decision will somehow render the imported product (primarily from Mexico) less desirable to U.S. consumers * * *" utterly misapprehends the Court's ruling and lays bare Applicants' concern: that if the statute is complied with U.S. consumers might choose U.S. products. The Court is not concerned with market share or with whether consumers would choose not to buy properly labeled foreign frozen vegetables. The Court is concerned only with the interpretation and enforcement of the statute. It is presumptuous of Applicants to impute or imply any other motive. The greatest injury claimed in the motion to intervene is that Applicants "would be compelled to mark their products in compliance with the new guidelines * * *." Memorandum, at 16. Proper enforcement of United States laws and regulations which affects parties exporting to the United States cannot be said to be unduly burdensome and is therefore not an "interest" entitling the parties to intervene.

The Court notes that as an additional basis Applicants' motion must fail because they have not alleged any basis for jurisdiction over then in this Court in either their Memorandum or their proposed answer.

Applicants' motion is denied, as improperly brought against an interlocutory decree.

ABSTRACTED CLASS[cut off]

DECISION NO./DATE JUDGE	PLAINTIFF	COURT NO.	ASSE[cut off]
C91/91 4/22/91 Aquilino, J.	E. Gluck Corp.	83-7-01045	716.09-7 715.05 Variou
C91/92 4/22/91 Aquilino, J.	E. Gluck Corp.	83-8-01096	716.09-7 715.05 Variou
C91/93 4/22/91 Aquilino, J.	E. Gluck Corp.	83-8-01177	716.09-7 715.05 Variou
C91/94 4/22/91 Aquilino, J.	E. Gluck Corp.	83-8-01218	716.09-7 715.05 Variou
C91/95 4/22/91 Aquilino, J.	E. Gluck Corp.	84-1-00050	716.09-7 715.05 Variou

SIFICATION DECISIONS

ESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
716.45, 5, etc. us rates	688.40, 688.45, 688.43, 688.42, etc. Various rates	Belfont Sales Corp. *v.* U.S., 878 F.2d 1413 (1989) or Texas Instruments, Inc. *v.* U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches, etc.
716.45, 5, etc. us rates	688.40, 688.45, 688.43, 688.42, etc. Various rates	Belfont Sales Corp. *v.* U.S., 878 F.2d 1413 (1989) or Texas Instruments, Inc. *v.* U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches, etc.
716.45, 5, etc. us rates	688.40, 688.45, 688.43, 688.42, etc. Various rates	Belfont Sales Corp. *v.* U.S., 878 F.2d 1413 (1989) or Texas Instruments, Inc. *v.* U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches, etc.
716.45, 5, etc. us rates	688.40, 688.45, 688.43, 688.42, etc. Various rates	Belfont Sales Corp. *v.* U.S., 878 F.2d 1413 (1989) or Texas Instruments, Inc. *v.* U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches, etc.
716.45, 5, etc. us rates	688.40, 688.45, 688.43, 688.42, etc. Various rates	Belfont Sales Corp. *v.* U.S., 878 F.2d 1413 (1989) or Texas Instruments, Inc. *v.* U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches, etc.

C91/96 4/23/91 Aquilino, J.	E. Gluck Corp.	86–7–00825	716.09 715. Vari
C91/97 4/23/91 Aquilino, J.	E. Gluck Corp.	86–9–01133	716.09 715. Vari
C91/98 4/23/91 Aquilino, J.	E. Gluck Corp.	86–9–01218	716.09 715. Vari
C91/99 4/23/91 Aquilino, J.	E. Gluck Corp.	87–2–00177	716.09 715. Vari
C91/100 4/23/91 Musgrave, J.	Electrohome Ltd.	89–12–00674	8528.1 4.5%
C91/101 4/23/91 Musgrave, J.	Nissho Iwai American Corp.	90–7–00335	700.95 12.5

9–716.45, .05, etc. rious rates	688.40, 688.45, 688.43, 688.42, etc. Various rates	Belfont Sales Corp. *v.* U.S., 878 F.2d 1413 (1989) or Texas Instruments, Inc. *v.* U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches, etc.
9–716.45, .05, etc. rious rates	688.40, 688.45, 688.43, 688.42, etc. Various rates	Belfont Sales Corp. *v.* U.S., 878 F.2d 1413 (1989) or Texas Instruments, Inc. *v.* U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches, etc.
9–716.45, .05, etc. rious rates	688.40, 688.45, 688.43, 688.42, etc. Various rates	Belfont Sales Corp. *v.* U.S., 878 F.2d 1413 (1989) or Texas Instruments, Inc. *v.* U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches, etc.
9–716.45, .05, etc. rious rates	688.40, 688.45, 688.43, 688.42, etc. Various rates	Belfont Sales Corp. *v.* U.S., 878 F.2d 1413 (1989) or Texas Instruments, Inc. *v.* U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches, etc.
10.8050 %	8471.92.40 Free of duty	Agreed statement of facts	Buffalo ECP 3000 & ECP 4000 data graphics projector systems
5 5%	700.45 10%	Mitsubishi Int'l Corp. *v.* U.S., S.O. 87–136 (1987)	New Orleans Footwear

ABSTRACTED CLASSIFICATION [

DECISION NO./DATE JUDGE	PLAINTIFF	COURT NO.	ASSESSED
C91/102 4/25/91 Aquilino, J.	E. Gluck Corp.	86-1-00032	716.09–716.45, 715.05, etc., Various rates
C91/103 4/25/91 Musgrave, J.	Olympus Corp.	90-1-00033	708.93 9%
C91/104 5/1/91 Musgrave, J.	American Cyanamid Co.	89-11-00628	709.27 7.9%
C91/105 5/1/91 Musgrave, J.	Astec USA (HK), Ltd.	89-5-00225	682.60 3% or 3.6%
C91/106 5/1/91 Musgrave, J.	Casio Inc.	90-4-00222	716.09–716.45, 715.05, etc. Various rates
C91/107 5/1/91 Aquilino, J.	E. Gluck Corp.	83-9-01272	716.09–716.45, 715.05, etc. Various rates

DECISIONS—Continued

HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
688.40, 688.45, 688.43, 688.42, etc. Various rates	Belfont Sales Corp. *v.* U.S., 878 F.2d 1413 (1989) or Texas Instruments, Inc. *v.* U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches, etc.
676.54 Free of duty	EAC Engineering *v.* U.S., 9 CIT 534 (1985)	New York Olympus Optical Pickup Model TAOHS–FM1
495.10 3.5%	Agreed statement of facts	Hartford Sterile surgical sutures
676.54 Free of duty	Digital Equipment Corp. *v.* U.S., 889 F.2d 267 (1989)	Houston Computer power supplies
688.40, 688.45, 688.43, 688.42, etc. Various rates	Belfont Sales Corp. *v.* U.S., 878 F.2d 1413 (1989) or Texas Instruments, Inc. *v.* U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches, etc.
688.40, 688.45, 688.43, 688.42, etc. Various rates	Belfont Sales Corp. *v.* U.S., 878 F.2d 1413 (1989) or Texas Instruments, Inc. *v.* U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches, etc.

C91/108 5/1/91 Aquilino, J.	E. Gluck Corp.	83–10–01454	7
C91/109 5/1/91 Aquilino, J.	E. Gluck Corp.	83–11–01611	7
C91/110 5/1/91 Aquilino, J.	E. Gluck Corp.	84–1–00065	7
C91/111 5/1/91 Aquilino, J.	E. Gluck Corp.	84–1–00083	7
C91/112 5/1/91 Aquilino, J.	E. Gluck Corp.	84–5–00685	7
C91/113 5/1/91 Aquilino, J.	E. Gluck Corp.	84–6–00761	7

716.09–716.45, 715.05, etc. Various rates	688.40, 688.45, 688.43, 688.42, etc. Various rates	Belfont Sales Corp. *v.* U.S., 878 F.2d 1413 (1989) or Texas Instruments, Inc. *v.* U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches, etc.
716.09–716.45, 715.05, etc. Various rates	688.40, 688.45, 688.43, 688.42, etc. Various rates	Belfont Sales Corp. *v.* U.S., 878 F.2d 1413 (1989) or Texas Instruments, Inc. *v.* U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches, etc.
716.09–716.45, 715.05, etc. Various rates	688.40, 688.45, 688.43, 688.42, etc. Various rates	Belfont Sales Corp. *v.* U.S., 878 F.2d 1413 (1989) or Texas Instruments, Inc. *v.* U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches, etc.
716.09–716.45, 715.05, etc. Various rates	688.40, 688.45, 688.43, 688.42, etc. Various rates	Belfont Sales Corp. *v.* U.S., 878 F.2d 1413 (1989) or Texas Instruments, Inc. *v.* U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches, etc.
716.09–716.45, 715.05, etc. Various rates	688.40, 688.45, 688.43, 688.42, etc. Various rates	Belfont Sales Corp. *v.* U.S., 878 F.2d 1413 (1989) or Texas Instruments, Inc. *v.* U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches, etc.
716.09–716.45, 715.05, etc. Various rates	688.40, 688.45, 688.43, 688.42, etc. Various rates	Belfont Sales Corp. *v.* U.S., 878 F.2d 1413 (1989) or Texas Instruments, Inc. *v.* U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches, etc.

ABSTRACTED CLASSIFICATIO[N]

DECISION NO./DATE JUDGE	PLAINTIFF	COURT NO.	ASSESSE[D]
C91/114 5/1/91 Aquilino, J.	E. Gluck Corp.	84-7-00947	716.09-716.4[5] 715.05, etc. Various rat[es]
C91/115 5/1/91 Aquilino, J.	E. Gluck Corp.	84-8-01142	716.09-716.4[5] 715.05, etc. Various rat[es]
C91/116 5/1/91 Aquilino, J.	E. Gluck Corp.	84-8-01200	716.09-716.4[5] 715.05, etc. Various rat[es]
C91/117 5/1/91 Aquilino, J.	E. Gluck Corp.	84-12-01747	716.09-716.4[5] 715.05, etc. Various rat[es]
C91/118 5/1/91 Aquilino, J.	E. Gluck Corp.	85-1-00119	716.09-716.4[5] 715.05, etc. Various rat[es]

ON DECISIONS—Continued

ED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
5, . tes	688.40, 688.45, 688.43, 688.42, etc. Various rates	Belfont Sales Corp. *v.* U.S., 878 F.2d 1413 (1989) or Texas Instruments, Inc. *v.* U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches, etc.
5, . tes	688.40, 688.45, 688.43, 688.42, etc. Various rates	Belfont Sales Corp. *v.* U.S., 878 F.2d 1413 (1989) or Texas Instruments, Inc. *v.* U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches, etc.
5, . tes	688.40, 688.45, 688.43, 688.42, etc. Various rates	Belfont Sales Corp. *v.* U.S., 878 F.2d 1413 (1989) or Texas Instruments, Inc. *v.* U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches, etc.
5, . tes	688.40, 688.45, 688.43, 688.42, etc. Various rates	Belfont Sales Corp. *v.* U.S., 878 F.2d 1413 (1989) or Texas Instruments, Inc. *v.* U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches, etc.
5, . tes	688.40, 688.45, 688.43, 688.42, etc. Various rates	Belfont Sales Corp. *v.* U.S., 878 F.2d 1413 (1989) or Texas Instruments, Inc. *v.* U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches, etc.

C91/119 5/1/91 Aquilino, J.	E. Gluck Corp.	85–2–00252	716.09–71[illegible] 715.05, [illegible] Various
C91/120 5/1/91 Aquilino, J.	E. Gluck Corp.	85–12–01714	716.09–71[illegible] 715.05, [illegible] Various
C91/121 5/2/91 Watson, J.	Astec USA (HK), Ltd.	89–11–00619	682.60 3% or 3.[illegible]
C91/122 5/2/91 Aquilino, J.	E. Gluck Corp.	85–1–00076	716.09–71[illegible] 715.05, [illegible] Various
C91/123 5/2/91 Aquilino, J.	E. Gluck Corp.	84–3–00394	716.09–71[illegible] 715.05, [illegible] Various
C91/124 5/2/91 Aquilino, J.	E. Gluck Corp.	84–4–00512	716.09–71[illegible] 715.05, [illegible] Various

16.45, , etc. s rates	688.40, 688.45, 688.43, 688.42, etc. Various rates	Belfont Sales Corp. *v.* U.S., 878 F.2d 1413 (1989) or Texas Instruments, Inc. *v.* U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches, etc.
16.45, , etc. s rates	688.40, 688.45, 688.43, 688.42, etc. Various rates	Belfont Sales Corp. *v.* U.S., 878 F.2d 1413 (1989) or Texas Instruments, Inc. *v.* U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches, etc.
3.6%	676.54 Free of duty	Digital Equipment Corp. *v.* U.S., 889 F.2d 267 (1989)	Houston Computer power supplies
16.45, , etc. s rates	688.40, 688.45, 688.43, 688.42, etc. Various rates	Belfont Sales Corp. *v.* U.S., 878 F.2d 1413 (1989) or Texas Instruments, Inc. *v.* U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches, etc.
16.45, , etc. s rates	688.40, 688.45, 688.43, 688.42, etc. Various rates	Belfont Sales Corp. *v.* U.S., 878 F.2d 1413 (1989) or Texas Instruments, Inc. *v.* U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches, etc.
16.45, , etc. s rates	688.40, 688.45, 688.43, 688.42, etc. Various rates	Belfont Sales Corp. *v.* U.S., 878 F.2d 1413 (1989) or Texas Instruments, Inc. *v.* U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches, etc.

ABSTRACTED CLASSIFICAT

DECISION NO./DATE JUDGE	PLAINTIFF	COURT NO.	ASSES
C91/125 5/2/91 Aquilino, J.	E. Gluck Corp.	84–12–01749	716.09–71 715.05, Various
C91/126 5/3/91 Aquilino, J.	KMart Corp.	91–2–00083	9503.90.7 6.8%

TION DECISIONS—Continued

ESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
716.45, 5, etc. s rates	688.40, 688.45, 688.43, 688.42, etc. Various rates	Belfont Sales Corp. *v.* U.S., 878 F.2d 1413 (1989) or Texas Instruments, Inc. *v.* U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches, etc.
70	9817.40.00 Free of duty	Agreed statement of facts	New York World globe

ABSTRACTED VALUAT

DECISION NO./DATE JUDGE	PLAINTIFF	COURT NO.	BASIS OF VALUATIO
V91/5 4/3/91 Musgrave, J.	Santa Cruz Imports, Inc.	89-5-00246	Transaction value
V91/6 4/23/91 Musgrave, J.	J.D. Mac-Donald & Co.	88-7-00499	Transaction value
V91/7 4/25/91 Musgrave, J.	Santa Cruz Imports, Inc.	89-5-00245	Transaction value

...TION DECISIONS

...F ...ON	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
	$.02 per piece as an assist for tag and label charges	Agreed statement of facts	San Francisco Wearing apparel
	Invoice unit values less cost of int'l freight and duty assessment included in said invoice price	Agreed statement of facts	Houston Fresh whole Atlantic ground-fish of Canadian origin
	$.02 per piece as an assist for tag and label charges	Agreed statement of facts	San Francisco Wearing apparel

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